

## A COMPENSATION SYSTEM FOR MILITARY VICTIMS OF SEXUAL ASSAULT AND HARASSMENT<sup>®</sup>

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### I. Introduction

After an alarming Pentagon Report<sup>1</sup> extrapolated that 26,000 active-duty servicemembers had been the victims of unwanted sexual contact by other active-duty servicemembers in 2012, the U.S. media turned its scrutiny on what President Barack Obama called “a scourge”<sup>2</sup> and General Martin Dempsey called “a crisis”<sup>3</sup> in the ranks.<sup>4</sup> Concerned with the purported “epidemic”<sup>5</sup> rates of sexual assault in the Department of Defense (DoD) and the corresponding impact on personnel health and

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<sup>1</sup> U.S. DEP’T OF DEF., 1 FISCAL YEAR 2012 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY exec. summary, at 3 (Apr. 15, 2013), [http://www.sapr.mil/media/pdf/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf) [hereinafter 2012 DoD SEXUAL ASSAULT REPORT]. Unwanted Sexual Contact (USC) is defined as follows:

The term “unwanted sexual contact” (USC) is the survey term for contact sexual crimes between adults prohibited by military law, ranging from rape to abusive sexual contact. USC involves intentional sexual contact that was against a person’s will or occurred when the person did not or could not consent. The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.

*Id.* at 2. The survey extrapolation of 26,000 victims should be viewed with great caution for a variety of reasons. See Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11. OHIO ST. J. OF CRIM. L. 579, 580-82 (Spring 2014).

<sup>2</sup> Robert Burns & Lolita C. Baldor, *Obama Vows to End ‘Scourge’ of Military Sex Abuse*, ASSOCIATED PRESS, May 17, 2013, <http://news.yahoo.com/obama-vows-end-scourge-military-sex-abuse-073251406.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Moolly O’Tolle, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012 9:36 A.M.), [http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department\\_n\\_1834196.html](http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html).

military readiness, Congress called for reform.<sup>6</sup> Some members proposed statutory changes to the Uniform Code of Military Justice (UCMJ),<sup>7</sup> while others suggested an overhaul of the commander's role in the military justice system.<sup>8</sup>

In addition to altering the accountability and reporting environments, in May 2013, in a meeting with Pentagon leaders and service chiefs at the White House, President Obama demanded justice for victims and consequences for perpetrators, saying that "[w]hen victims do come forward, they deserve justice. Perpetrators have to experience consequences."<sup>9</sup> In response to President Obama's call for justice and

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<sup>6</sup> See, e.g., Congresswoman Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 267-68 (Winter 2013); Tom Brune, *Gillibrand: Reform Military Sex Assault Prosecution*, LONG ISLAND NEWS DAY (June 29, 2013), <http://www.newsday.com/long-island/gillibrand-reform-military-sex-assault-prosecution-1.5595241>.

<sup>7</sup> See, e.g., S. 1917, 113th Cong. (2d Sess. 2014) (Victims Protection Act of 2014). The bill, if passed by the House, would have stopped commanders from overturning jury convictions in sexual assault cases, erased the statute of limitations for military rapes, and provided independent counsel to victims of sex crimes. See also S. 967, 113th Cong. (1st Sess. 2013) (Military Justice Improvement Act of 2013) (proposing the modification of, among other elements, "the factor relating to character and military service of the accused on initial disposition" and the "clemency authority of the convening authority"). R. CHUCK MASON, CONG. RESEARCH. SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS 16 (2013); Chris Carroll, *Hagel: Change to UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS & STRIPES, Apr. 8, 2013, <http://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629>.

<sup>8</sup> "Both the House and Senate versions of the FY2014 NDAA [National Defense Authorization Act] include language addressing the ability of the commander to consider the character and military service of the accused in the initial disposition of alleged offenses." MASON, *supra* note 7, at 10; H.R. 1960, § 546, 113th Cong., 1st Sess. (2013) (Amendment to Manual for Courts-Martial to Eliminate Considerations Relating to Character and Military Service of Accused in Initial Disposition of Sex-Related Offenses); S. 1197, § 565, 113th Cong., 1st Sess. (2013) (Modification of Manual for Courts-Martial to Eliminate Factor Relating to Character and Military Service of the Accused in Rule on Initial Disposition); see also Jillian Weinberger, *Sexual Assault in the Military: Sen. Kirsten Gillibrand's Proposals for Change*, THE TAKE AWAY (May 16, 2013), <http://www.thetakeaway.org/2013/may/16/sexual-assault-military-sen-kirsten-gillibrands-proposals-change/>.

<sup>9</sup> Bryant Jordan, *Obama: Sexual Assault Threatens National Security*, MILITARY.COM (May 17, 2003), <http://www.military.com/daily-news/2013/05/17/obama-sexual-assault-threatens-national-security.html>; see also Donna Cassata & Richard Lardern, *House Oks 2-year Sentence for Military Sex Assault*, YAHOO NEWS, June 13, 2013, <http://news.yahoo.com/house-oks-2-sentence-military-sex-assault-201755582.html> (noting a new measure endorsed by the House that would punish perpetrators with "a mandatory

punishment, this article proposes the creation of a Military Crime Victims Compensation Board (military compensation board or MCB), which would provide military victims of sexual assault and harassment monetary compensation by fining perpetrators.

In outlining such a system, the article first provides a brief background on how the military justice system has traditionally handled and currently handles sexual assault and harassment claims, the current options for victims to seek compensation, and an overview of reforms proposed by legal scholars and professionals. The article then discusses the states' crime victim compensation boards, which provide a basic framework for the proposed MCB. Drawing on a variety of federal, state, and military laws, the article next explains how the MCB would function practically within the military, outlining a potential system of compensation floors and ceilings. Finally, the article examines the benefits of compensating victims through the MCB, as opposed to state compensation boards, and it delineates the benefits of creating the MCB rather than implementing other more disruptive remedies.

## II. Military Justice System: Sexual Assault and Harassment

### A. A Separate System—A Brief Overview of the U.S. Military Justice System

Society has long recognized that the military, as a “specialized community,”<sup>10</sup> requires a justice system fitting to its unique responsibilities: fighting and winning the nation's wars. As a consequence, the Constitution treats differently criminal cases that arise from the military services than those from civilian life. The Fifth Amendment states, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger.”<sup>11</sup> Indeed recognizing the military's “fundamental necessity for obedience . . . [and] the consequent necessity for imposition of discipline,”<sup>12</sup> courts

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minimum sentence of two years in prison for a member of the armed services convicted of rape or sexual assault in a military court”).

<sup>10</sup> Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

<sup>11</sup> Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. L. REV. 151, 176 (2007).

<sup>12</sup> Parker v. Levy, 417 U.S. 733, 758 (1974).

have also traditionally deferred to the military concerning military matters. As Justice Jackson said in 1974, “judges are not given the task of running the Army.”<sup>13</sup>

In general, as part of its Article I, Section 8, power to make “rules for the Government and Regulation of land and naval Forces,” in 1950, Congress enacted the UCMJ. Specifically, the UCMJ “contains the substantive and procedural laws governing the military justice system,” while the *Manual for Courts-Martial (MCM)*—which is derived from the President’s executive orders—expands on these laws.<sup>14</sup>

Military criminal investigative agencies, such as the Army Criminal Investigation Command (CID), conduct investigations into allegations of criminal acts by military personnel. Once these investigations are complete, a commander decides how to dispose of offenses, through adverse administrative action, non-judicial punishment,<sup>15</sup> or trial by court-martial. Throughout this process, military lawyers (judge advocates) advise those commanders, and they prosecute the cases referred to courts-martial. While the military justice system has retained this basic structure for decades, its responses to sexual assault and harassment claims have changed greatly since the integration of women into the armed services.

## B. Sexual Assault and Harassment Claims

### 1. *The Women’s Army Corps and the Equal Opportunity Program*

When the United States first permitted women to serve as regular, permanent members of the armed forces, the military quickly built additional sexual assault and harassment protections into the women’s chain of command. Just three years after 30,000 women joined the Army

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<sup>13</sup> *Willoughby*, 345 U.S. at 93.

<sup>14</sup> OFFICE FOR VICTIMS OF CRIME, SPECIFIC JUSTICE SYSTEMS AND VICTIMS’ RIGHTS (Grace Coleman et al., 1999), [https://www.ncjrs.gov/ovc\\_archives/nvaa99/chap3-3.htm](https://www.ncjrs.gov/ovc_archives/nvaa99/chap3-3.htm) [hereinafter COLEMAN REPORT].

<sup>15</sup> Article 15 of the UCMJ provides a means of handling minor offenses requiring immediate corrective action. These are non-adversarial hearings over which the commander presides. Punishment is limited to sixty days of restriction, forty-five days of extra duty, forfeiture of half of one month’s pay for two months, correctional custody for thirty days (for the ranks E-5 and below only), and a reprimand. See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2012).

in World War I, Congress passed the Women's Armed Services Integration Act of 1948, granting women permanent status in the gender-segregated Women's Army Corps (WAC).<sup>16</sup> While the Army remained segregated, the WAC chain of command and staff advisors—known as the “Petticoat Connection”—advocated for and helped women resolve sexual harassment issues.<sup>17</sup> During the late 1970s and after more than twenty years, this advocacy system fell apart when the WAC was dissolved after the service academies began admitting females.<sup>18</sup>

The Army, however, in response to “violent confrontations that erupted between racial and ethnic groups at posts and installations . . . in 1969 and 1970,” had already created an alternative reporting system called Equal Opportunity (EO).<sup>19</sup> Today, the EO “strives to ensure fair treatment of all soldiers based solely on merit, fitness, capability, and potential in support of readiness.”<sup>20</sup> The EO offers an avenue through which complainants may report discrimination and seek sexual harassment processing and resolution.<sup>21</sup> Providing both male and female servicemembers with an avenue for redress is significant because although women—who now comprise 15% of the military<sup>22</sup>—remain “more likely to be sexually assaulted in the military than men, experts say assaults against men are vastly underreported.”<sup>23</sup> Men, who are more reluctant to report sexual assault, may comprise 53% of sexual assault victims.<sup>24</sup>

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<sup>16</sup> THE WILLIAMSBURG COLONIAL FOUNDATION, TIME LINE: WOMEN IN THE U.S. MILITARY (2008); The Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356, 356–57 (repealed 1967).

<sup>17</sup> Hollywood, *supra* note 11.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. DEP'T OF THE ARMY, COMMANDER'S EQUAL OPPORTUNITY HANDBOOK 9, available at [http://www.uscg.mil/hq/cg00/cg00h/History\\_files/ArmyEOHandbook.pdf](http://www.uscg.mil/hq/cg00/cg00h/History_files/ArmyEOHandbook.pdf) [hereinafter ARMY EO HANDBOOK]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 6 (20 Sept. 2012) [hereinafter AR 600-20] (laying out the purpose, contents, and requirements of the Army's EO program).

<sup>20</sup> ARMY EO HANDBOOK, *supra* note 19, at 10.

<sup>21</sup> *Id.*

<sup>22</sup> James Dao, *In the Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 23, 2013, <http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all>.

<sup>23</sup> *Id.*; see also 2012 DoD SEXUAL ASSAULT REPORT, *supra* note 1, at 2 (citing 2012 Workplace and Gender Relations Survey of Active-duty Members (Mar. 2013), <http://www.sapr.mil/index.php/research> [hereinafter 2012 WGRA]) (“6.1 percent of Active-duty women and 1.2 percent of Active-duty men indicated they experienced some kind of USC in the 12 months prior to being surveyed.”)

<sup>24</sup> *Id.* On September 30, 2012, the total Department of Defense (DoD) active-duty population was 1,387,488, the female population on active-duty was 204,309, and the

## 2. Pursuing a Claim

The military defines sexual assault as “intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent.”<sup>25</sup> Under the DoD’s Confidentiality Policy, victims of sexual assault may file a restricted or unrestricted report of the incident.<sup>26</sup> If a victim chooses to file a restricted report, the individual may contact a Sexual Assault Response Coordinator (SARC), Victim Advocate, healthcare provider, chaplain, or Special Victims Counsel to receive medical care, treatment, and counseling without triggering an investigation.<sup>27</sup> The SARC informs the installation commander that an assault occurred but does not provide any details that identify the victim.<sup>28</sup> By contrast, unrestricted reporting triggers an investigation, requiring notification to law enforcement, the chain of command, and the SARC.<sup>29</sup> If the allegation is founded (or substantiated), the accused’s brigade commander has the power to act on the substantiated allegation and may use non-judicial or administrative processes or, normally through the case’s referral to a higher-level commander, court-martial.<sup>30</sup> Should the case reach court-martial stage,<sup>31</sup>

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male population on active-duty was 1,183,179. DoD Pers. and Procurement Statistics, <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm> (last visited July 10, 2014). Notably, 6.1% of 204,309 (female active-duty population) is 12,463; and 1.2% of 1,183,719 (male active-duty population) is 14,205.

<sup>25</sup> *SAPR – MCCS Lejeune-New River*, MARINE CORPS CMTY. SERVS. LEJEUNE-NEW REVIEW, <http://www.mccslejeune.com/sapr/> (last visited July 16, 2014).

<sup>26</sup> *Reporting Options: Restricted/Unrestricted Program*, U.S. DEP’T OF THE ARMY, [http://www.sexualassault.army.mil/policy\\_restricted\\_unrestricted\\_reporting.cfm](http://www.sexualassault.army.mil/policy_restricted_unrestricted_reporting.cfm) (last visited July 16, 2014); see also U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (28 Mar. 2013).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *The Facts*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/the-facts/> (last visited July 10, 2014).

<sup>31</sup> There are three levels of court-martials in general use, each with different procedures, rights, and possible punishments: summary, special, and general. A summary court-martial is limited to imposing thirty days of confinement and is not considered a conviction. A special court-martial is limited to imposing one year of confinement and a bad-conduct discharge. A general court-martial is a felony-level court-martial with punishments limited by the *Manual for Courts-Martial*.

military prosecutors pursue a conviction under the applicable UCMJ articles.<sup>32</sup>

The Army's definition of sexual harassment is "a form of gender discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature between the same or opposite genders . . . ."<sup>33</sup> The filing and processing of sexual harassment complaints follow the same procedures as for EO complaints.<sup>34</sup> Victims of sexual harassment may choose between filing informal or formal complaints.<sup>35</sup>

Informal complaints are not filed in writing and "may be resolved directly by the individual, with the help of another unit member, the commander or other person in the complainant's chain of command."<sup>36</sup> If uncomfortable filing within their chain of command, victims may also turn to a chaplain, provost marshal, medical personnel, and the staff judge advocate, among others.<sup>37</sup> During this process, efforts are made to maintain confidentiality, but confidentiality "will neither be guaranteed nor promised to the complainant by agencies other than the chaplain or a lawyer."<sup>38</sup> Any agency that receives an informal or formal complaint must talk with the victim and attempt to assure resolution of the issue,

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<sup>32</sup> Depending on the circumstances, sexual assault or harassment can fall under one of several UCMJ charges:

An act of sexual harassment may constitute "cruelty and maltreatment of a subordinate," extortion, indecent language, provoking words and gestures, disorderly conduct, and/or fraternization. If the harassment involves physical contact, it may constitute assault, assault consummated by a battery, indecent assault, assault with the intent to commit rape or sodomy, rape, or sodomy, as well as cruelty and maltreatment and/or fraternization. In addition, a court-martial could punish an accused under the so-called "general article" for conduct to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces, or as conducting unbecoming an officer.

Michael I. Spak & Jonathan P. Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 CLEV. ST. L. REV. 335, 345 (1999) (footnotes omitted).

<sup>33</sup> AR 600-20, *supra* note 19, para. 7-4(a).

<sup>34</sup> *Id.* at 7-9.

<sup>35</sup> *Id.* app. D.

<sup>36</sup> *Id.* para. a(1).

<sup>37</sup> *Id.* a(2)(a-g).

<sup>38</sup> *Id.* a(3).



but commanders are ultimately responsible for “eliminating underlying causes of all complaints.”<sup>39</sup>

Formal sexual harassment complaints must be filed in writing within sixty days from the date of the alleged incident<sup>40</sup> with the commander at the lowest echelon of command “at which the complainant may be assured of receiving a thorough, expeditious, and unbiased investigation of the allegations,” though that commander need not be in the immediate company or battalion of the victim.<sup>41</sup> Commanders will then conduct an investigation personally or appoint an investigating officer within fourteen days of receiving the complaint, implement a plan to protect the complainant, and consult with a judge advocate or legal advisor should a violation of the UCMJ be suspected.<sup>42</sup> At a minimum, if the allegation is substantiated, an offender will be counseled, but a commander may engage the full range of disciplinary actions to resolve the complaint.<sup>43</sup>

### 3. Remedies Currently Available Are Limited or Barred

#### a. Civil Suits in Tort—Barred

While the military provides victims access to necessary medical and mental health care,<sup>44</sup> the *Feres* doctrine prevents servicemembers who are sexually harassed or assaulted by another soldier from holding the government vicariously liable under the Federal Tort Claims Act (FTCA). Essentially, “[a]ny complaint of injury that occurs while the complaining party is in active-duty status, on a military base, or engaged in a military mission will be barred from suit under *Feres*.”<sup>45</sup> Courts

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<sup>39</sup> *Id.* a(4–5).

<sup>40</sup> If a complaint is received after sixty days, commanders may (and in practice often always) still conduct an investigation into allegations as long as they consider “the reason for the delay, the availability of witnesses, and whether a full and fair inquiry or investigation can be conducted.” *Id.*

<sup>41</sup> *Id.* b(1).

<sup>42</sup> *Id.* app. D-4.

<sup>43</sup> *Id.* D-4, -5, -6, -7.

<sup>44</sup> The medical needs of servicemembers are mostly provided by DoD hospitals. Some medical services are provided by civilian providers and are paid by TRICARE—the health care program serving the Uniformed servicemembers, retirees, and their families.

<sup>45</sup> Henry Mark Holzer, *The Endless Ordeals of Jacqueline Ortiz: A Desert Storm Soldier’s Unsuccessful Attempt to Recover for a Sexual Attack by Her First Sergeant*, 24 N.M. L. REV. 51, 59 (1994); see also *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding the government is not liable under the FTCA, “for injuries to servicemen where



have liberally interpreted and applied the “incident to service” test to a preclusive degree. For example, a Marine Corps private involved in an automobile accident on a public highway while on leave was held to have been injured “incident to service.”<sup>46</sup> Similarly, in *Woodside v. United States*, an Air Force officer, “studying on his own time for a commercial pilot’s license, was injured ‘incident to service’ when the instruction plane crashed.”<sup>47</sup>

The *Feres* court’s rationale for barring military victims’ claims is: (1) the military offers “a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel,” (2) permitting soldiers to sue the government or each other might have a negative effect on “military order, discipline, and effectiveness,” and (3) a “corresponding unfairness” would arise if non-uniform local tort law decided service-connected claims.<sup>48</sup>

While *Feres* prevents victims from filing a suit against the government and recovering from its “deep pockets,” military victims may sue their perpetrators in those persons’ individual capacities in the same way civilian victims may. But military victims may be as unlikely to do so as civilian victims: civil damages are uncertain, victims may be hesitant to pay for lawyers in light of an uncertain outcome, and victims may be emotionally incapable of going through a civil trial after already enduring the previous criminal trial or, in the case of military victims, the previous military judicial process. These concerns are discussed in greater detail in Part III.E of this article.<sup>49</sup>

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the injuries arise out of or are in the course of activity incident to service.”); *Lanus v. United States*, No. 12-862, 2013 WL 3213613 (2013) (denying a writ of certiorari to review the *Feres* doctrine); *Chappell v. Wallace*, 462 U.S. 296 (1983) (extending *Feres* to constitutional torts committed by the military). See also Rachel Natelson, *The Unfairness of the Feres Doctrine*, TIME (Feb. 25, 2013), <http://nation.time.com/2013/02/25/the-unfairness-of-the-feres-doctrine/> (noting how U.S. District Judge Amy Jackson dismissed *Klay v Panetta*, a civil lawsuit in which the plaintiff alleged the Pentagon failed to protect the plaintiff and servicemembers from sexual violence).

<sup>46</sup> *Sanchez v. United States*, 878 F.2d 633 (2d Cir. 1989).

<sup>47</sup> *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980).

<sup>48</sup> *The Feres Doctrine: An Examination of this Military Exception to the Federal Torts Claims Act: Hearing before the S. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Paul Harris, Deputy Assoc. Attorney Gen.); *Feres*, 340 U.S. at 140–43 (1950).

<sup>49</sup> See discussion *infra* Part III.E.

For those military victims who have already gone through the military judicial process, it would likely be more efficient for the military to distribute compensatory damages based on those military findings rather than for military victims to switch court systems and begin a civil suit from scratch. In addition it is important for the military to internally “own” the meting out of justice and punishment of perpetrators. If that duty is farmed out to civilian courts to a degree, the military will lose an opportunity to send a strong message and change its culture from the inside out.

*b. No-Fault Compensation Schemes—Limited in Scope*

Though the military has a no-fault compensation scheme for injured military personnel, the current compensation structure does not adequately support victims of sexual assault or harassment, and it fails to provide victims a civil remedy (like a civilian employee would have against their perpetrator’s employer) for sexual harassment or assault.<sup>50</sup> Without the option to sue the government under tort law, it is especially important that the compensation scheme functions in a fair, timely, and compelling manner.

The DoD recognizes the important role compensation plays in “recruiting, retaining and motivating” servicemembers and, thus, offers programs that compensate members for their injuries and resulting financial losses.<sup>51</sup> If injured, members may receive active-duty

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<sup>50</sup> Several statutory authorities permit civilian employees to hold their employers vicariously liable for a perpetrator’s sexual harassment. For example, an employer can be held vicariously liable under Title VII of the Civil Rights of 1964 for creating a hostile work environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998) (“[I]t makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority. . .”); *see also Burlington Indus. v. Ellerth*, 524 U.S. 742, 766 (1998). States have their own statutes that permit similar claims. Under California’s Fair Employment and Housing Act (FEHA), for example, “the employer is vicariously and strictly liable for sexual harassment by a supervisor.” *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1327 (Cal. App. 2d Dist. 1996). Some courts also hold employers liable under more traditional tort theories. *See, e.g., McLean v. Kirby Co.*, 490 N.W.2d 229, 236 (N.D. 1992) (holding an employer vicariously liable for rape of a customer by a salesman because a foreseeable risk of physical harm existed when the employer did not investigate the salesman’s background); *Samuels v. Southern Baptist Hospital*, 594 So. 2d 571, 574 (La. App. 1992) (finding the hospital vicariously liable for a hospital assistant’s sexual assault of a patient).

<sup>51</sup> THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION, MAIN REPORT, at xvi (2012), [http://militarypay.defense.gov/reports/qrmc/11th\\_QRMC\\_Main\\_Report\\_\(299](http://militarypay.defense.gov/reports/qrmc/11th_QRMC_Main_Report_(299)

compensation during hospitalization or rehabilitation, and upon retirement or separation, members are eligible for Social Security, U.S. Department of Veteran Affairs benefits, or DoD monetary disability compensation.<sup>52</sup> Servicemembers' Group Life Insurance (SGLI) and Traumatic Injury Protection (TSCLI) also "insures service members against a list of specific traumatic injuries, such as amputation, paralysis, burns, sight or hearing loss, facial reconstruction, coma, and traumatic brain injury."<sup>53</sup> Moreover, veterans who have suffered a sexual trauma receive free healthcare and disability compensation from the Veterans Administration (VA), even if they did not report the assault or harassment at the time of the offense, provided they can prove the injury occurred while they were in the service (the service-connection doctrine).<sup>54</sup>

These compensation programs provide relief in many categories, but as Francine Banner notes in her article *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, substantive remedies for military victims of sexual assault and harassment are elusive.<sup>55</sup> The Veterans Legal Services Clinic at Yale Law School recently released a report that found veterans face "a broken bureaucracy, with protracted delays and inaccurate adjudications" when applying for disability claims.<sup>56</sup> The difficulties experienced when filing disability claims are compounded when filing sexual trauma claims due to the difficulty of calculating the injuries caused by in-service sexual trauma, the procedural and evidentiary obstacles of proving that trauma, noticeable

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pp)\_Linked.pdf [hereinafter QRM REPORT]. The amount of compensation is dependent on a variety of factors such as "a member's duty status, degree of disability, years of service, and other earnings." *Id.* at 94

<sup>52</sup> *Id.* The VA and DoD use similar disability compensation models that depend on data gathered from medical and physical evaluation boards. *Army Integrated Disability Evaluations System (IDES)*, ARMY Physical Disability Evaluation System (PDES), [http://usarmy.vo.llnwd.net/e2/rv5\\_downloads/features/readyandresilient/ARMY\\_IDES.pdf](http://usarmy.vo.llnwd.net/e2/rv5_downloads/features/readyandresilient/ARMY_IDES.pdf).

<sup>53</sup> QRM REPORT, *supra* note 51, at 96. Injured personnel may also receive Social Security Disability Insurance (SSDI) benefits if they have a physical or mental condition that prevents them from engaging in any "substantial gainful activity." *Id.*

<sup>54</sup> Associated Press Staff, *Military Sex Abuse Victims Seek VA Help*, CBS NEWS (May 20, 2013, 12:12 P.M.), <http://www.cbsnews.com/military-sex-abuse-victims-seek-va-help/> [hereinafter *VA Help*].

<sup>55</sup> Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 764–66 (2013).

<sup>56</sup> VETERANS LEGAL SERVS. CLINIC, YALE LAW SCHOOL, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 1 (2013) [hereinafter VLSC REPORT].

gender discrimination in the distribution of monetary awards, and regional disparities in award distribution.<sup>57</sup>

Unlike other injuries, the VA compensation programs are less accurate in detecting and compensating members for the invisible and sometimes latent injuries that victims of sexual assault and harassment face, such as depression, flashbacks, military sexual trauma (MST), substance abuse, or sleep and eating disorders.<sup>58</sup> Unlike burns or broken limbs, the effects of sexual assault are not always obvious, and the rehabilitative and long-term disability costs are difficult to calculate.<sup>59</sup> These “invisible injuries” will increase the difficulty of (1) proving that the victim has a medically diagnosed disability and (2) ensuring that the victim receives a significant enough VA “disability percentage rating” to merit receiving VA compensatory funds.<sup>60</sup> In addition to proving that the victim meets VA-disability standards, victims seeking disability compensation related to sexual trauma must submit proof that the sexual assault or harassment was casually connected to their military service, which places a tough-to-meet evidentiary standard on the majority of victims who do not file a formal or informal report.<sup>61</sup>

Proving military sexual trauma is thus more difficult than proving other types of trauma because the military could ostensibly attribute the

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<sup>57</sup> *Id.* at 1–14.

<sup>58</sup> *Effects of Sexual Assault*, RAINN, <http://www.rainn.org/get-information/effects-of-sexual-assault> [hereinafter *Effects of Sexual Assault*]. See Holzer, *supra* note 45, at 54 (describing the injuries suffered by a military victim of sexual abuse, as “emotional numbness, ambivalence, feelings of isolation, alienation from family and friends, hopelessness, lack of motivation . . . overall emotional breakdown . . . humiliation, anger and mood swings . . . nauseat[ion] and fatigue[] . . . [inability to] seek employment or return to college.”)

<sup>59</sup> Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 453 (2005) (“It is true that the harm of rape, unlike that of battery, can be primarily emotional and thus difficult to verify with objective evidence, but this does not in any way negate its seriousness.”).

<sup>60</sup> PAMELA VILLARREAL & KYLE BUCKLEY, NAT’L CENTER FOR POLICY ANALYSIS, THE VETERANS DISABILITY SYSTEM: PROBLEMS AND SOLUTIONS 4 (2012), available at <http://www.ncpa.org/pdfs/bg166.pdf>.

<sup>61</sup> “To get disability benefits related to sexual trauma, veterans must be diagnosed with a health problem such as . . . PTSD, submit proof that they were assaulted or sexually harassed in a threatening manner and have a VA examiner confirm a link to their health condition.” Kevin Freking, *Military Sexual Assault Victims Seek Help from Veterans Affairs*, HUFFINGTON POST (May 20, 2013, at 9:49 a.m.), [http://www.huffingtonpost.com/2013/05/20/military-sexual-assault\\_n\\_3306295.html](http://www.huffingtonpost.com/2013/05/20/military-sexual-assault_n_3306295.html). For this reason, a proposed bill by Rep. Chellie Pingree (D-ME) would let “a veteran’s word to serve as sufficient proof that an assault occurred” for a disability claim. *Id.*

trauma not to incidents that occurred during military service but to pre-military sexual abuse.<sup>62</sup> Moreover, lay testimony is “often insufficient to prove the occurrence of the trauma,” and the VA has not chosen to ease this burden of proof as it has for “veterans with [Post traumatic stress disorder (PTSD)] resulting from combat, [Prisoner of War (POW)] status, and most recently, ‘fear of hostile military or terrorist activity.’”<sup>63</sup>

Even if a victim could present the corroboration needed to show causation, obtaining benefits is still an “exercise in bureaucracy requiring [the] filling out of more than 20 documents in different systems.”<sup>64</sup> For instance, if, after this application process, a veteran is ultimately denied benefits, he or she may appeal to the U.S. Court of Veterans Claims and, later, to the U.S. Court of Appeals for the Federal Circuit, elongating the claims process.<sup>65</sup> In fact, the average time that a veteran awaits a benefits decision is 260 days, and as of November 2, 2013, the backlog of disability claims in VA regional offices (VAROs) was over 400,000.<sup>66</sup> Perhaps for these reasons, veterans applying for military sexual trauma compensation only have a 50% chance of receiving these benefits;<sup>67</sup> “the grant rate for MST-related PTSD claims has lagged behind the grant rate for other PTSD claims by between 16.5 and 29.6 percentage points every year,” and the percentage of erroneously denied claims has risen up to 66% in certain VAROs.<sup>68</sup>

For female victims, however, there is yet another obstacle. Only 22 VA offices “offer clinics employing personnel specifically trained to deal with women’s experience of violence.”<sup>69</sup> To add insult to injury, women on average receive lower payments than men do for trauma compensation, and VA compensation for servicemembers as a whole is often “dramatically lower than that available in civilian contexts.”<sup>70</sup>

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<sup>62</sup> Banner, *supra* note 55, at 765–66.

<sup>63</sup> VLSC REPORT, *supra* note 56, at 3.

<sup>64</sup> Banner, *supra* note 55, at 765–66.

<sup>65</sup> VLSC REPORT, *supra* note 56, at 2.

<sup>66</sup> *Id.* at 2–3.

<sup>67</sup> VA Help, *supra* note 54.

<sup>68</sup> VLSC REPORT, *supra* note 56, at 1, 4. For instance, the St. Paul Regional VA Office “has a particularly bad record of MST-related PTSD disability benefit claims in recent years, granting the lowest percentage of any VARO [VA Regional Office] in 2011 and 2012.” *Id.* at 4. The discrepancy in 2012 at the St. Paul Regional Office “between MST-related PTSD and non-MST-related PTSD disability benefit grant rates . . . was a remarkable 35.1 percentage points.” *Id.*

<sup>69</sup> *Id.* at 767.

<sup>70</sup> Banner, *supra* note 55, at 765–67.

Moreover, while many of the VA's medical programs for veterans are also available for active-duty servicemembers, the VA's inadequate monetary aid comes to many only after those harassed and abused have left the service, and those responsible for their injuries have no responsibility to pay the government's costs. Banner writes, "for victims of military sexual assault and trauma, the result is often retribution rather than recompense."<sup>71</sup> As a result, victims "not infrequently are discharged themselves or leave the service willingly after suffering retaliation for reporting attacks," and accordingly, 54% of active-duty women do not report incidents for fear of reprisal.<sup>72</sup> That means that for many, victims do not receive adequate compensation because either they never report the incident while in the service or they receive help too late—only after they may have experienced retribution in addition to sexual assault. Such a result evidences a flawed system. It is time for the military to compensate its victims fairly, in a process that considers fully the unique nature of military sexual trauma and during the time when victims most need the support.

For many of the reasons discussed above, Chellie Pinegree (D-ME) sponsored H.R. 671, the Ruth Moore Act of 2013, to, among other things, "improve the disability compensation evaluation procedure of the Secretary of Veterans Affairs for veterans with mental health conditions related to military sexual trauma."<sup>73</sup> This bill, had it passed, would have done much good to reform the VA-compensation system. It is not, however, the complete answer to the problem of sexual assault in the military because it does not place any of the financial responsibility for the victim's needs on the perpetrator. A reformed VA system, while important for later victim compensation, will not, of itself, punish or create a deterrent effect for perpetrators. Furthermore, a military compensation board may help the VA's backlog. It might also help the VA's goal of financially helping injured servicemembers by alleviating victims' immediate financial needs, filling in the financial holes left by the overburdened VA system, and providing funds for those suffering from sexual abuse or harassment but who do not meet the VA's minimum disability rating.

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<sup>71</sup> *Id.* at 768–71.

<sup>72</sup> *Id.* at 768–79.

<sup>73</sup> H.R. 671, 113th Cong. (2013).

Lastly, the military provides transitional compensation for family members of military personnel who have “received notification of an administrative separation or court-martial conviction for domestic abuse, child abuse or child sexual abuse.”<sup>74</sup> The 2014 National Defense Authorization Act (NDAA) also requires the services to investigate the merits and feasibility of providing payments to dependents of soldiers who are convicted by court-martial and separated from active-duty accordingly.<sup>75</sup> These current and contemplated forms of compensation are extremely narrow in focus, however, and provide no relief for military victims who are not dependents or spouses of their abuser.

*c. Restitution—An Unlikely Option*

Unlike civilian statutes, the UCMJ does not authorize restitution from the offender as a form of sentence although DoD policy allows convening authorities to include restitution as a condition of pretrial agreements or an accused’s release from confinement.<sup>76</sup> Under Article 139 of the UCMJ, commanders may direct servicemembers to pay victims for “willful damage or theft of property.”<sup>77</sup> Article 139, however, is not used to compensate victims of violent crimes for personal injury, or pain and suffering, and even if it were, it would leave in the hands of the commander the heavy responsibility of converting physical, mental, and emotional injuries into a dollar value. Placing the calculation of monetary compensation with individual commanders would risk horizontally inequitable results and would place a large administrative burden on their time. Furthermore, the idea of considering a victim’s body or psyche as “damaged property” could be demoralizing for a victim, and ultimately, it does not textually treat the issues of sexual assault and harassment with the proper level of sensitivity that both require.

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<sup>74</sup> *Transitional Compensation Program*, ARMY ONESOURCE, <https://www.myarmyonesource.com/familyprogramsandservices/familyprograms/familyadvocacyprogram/transitionalcompensationprogram/default.aspx>.

<sup>75</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 652 127 Stat. 672, 788 (2013).

<sup>76</sup> COLEMAN REPORT, *supra* note 14; see MCM, *supra* note 15, R.C.M. 705(c)(2)(C).

<sup>77</sup> UCMJ art. 193 (2011).



*d. State Compensation Boards—An Inadequate Remedy*

Victims may opt to seek help from state compensation boards, but for reasons that will be discussed later, the state boards fall short of adequately providing for military victims' needs and imposing appropriate consequences on offenders. Additionally, subjecting military victims to a patchwork state system with non-uniform compensation standards seems inherently unfair, especially when thousands of DoD active-duty personnel are assigned outside the United States where no state compensation systems are available.<sup>78</sup>

*4. Proposed Changes and Why They Will Not Work*

*a. Overturning the Feres Doctrine—Not a Realistic Choice*

Some legal scholars and practitioners claim that overturning the *Feres* doctrine would solve the inequities in the compensation system by giving military victims the ability to hold the government vicariously liable for the incident-to-service tortious actions of servicemembers under the FTCA.<sup>79</sup> Unfortunately, even in the unlikely event Congress were to legislatively overturn the affirmed, and entrenched, *Feres* doctrine, the FTCA precludes liability unless the claimant can show that the servicemember's wrongful acts or omissions happened while he or she was "acting within the scope of his office or employment."<sup>80</sup> The "scope of employment" standard still precludes claims of sexual assault and harassment because sexual assault and harassment "cannot be considered performing the employer's work."<sup>81</sup>

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<sup>78</sup> Military members have a "home of record," which is almost always the state where they first joined the military, and a "legal residency." OFFICE OF THE STAFF JUDGE ADVOCATE LEGAL ASSISTANCE OFFICE, INFORMATION PAPER—STATE OF LEGAL RESIDENCE 1 (2012). A "home of record" is used by the military to "determine a number of military benefits" and could potentially serve as the basis for applying for state compensation funds when abroad. *Id.* However, this does not solve the other problems associated with having military victims apply to state compensation boards, nor is it clear that using a "home of record" would be superior to using a legal residence as a basis for application.

<sup>79</sup> Spak & Tomes, *supra* note 32, at 335.

<sup>80</sup> *Id.* The FTCA also bars military members from bringing cases arising from (a) combat activities, (b) conduct that happened in a foreign country, or (c) certain intentional torts, "whether based on assault or negligence that resulted in the intentional tort." 28 U.S.C. § 1346(b) (2012).

<sup>81</sup> Holzer, *supra* note 45, at 55–56. Even so, the FTCA does not immunize offenders from "violations of the plaintiff's federal Constitutional rights, or to claims based on the violation of federal statutes which allow actions to be brought against individuals. In

Any claim barred by the FTCA is also is barred from monetary recovery under the Military Claims Act (MCA). The MCA allows any individual who has a claim for property damage, personal injury, or death that is caused by a civilian employee or service member to apply for relief from the Armed Forces. The MCA, however, “does not allow recovery for . . . claims otherwise excluded under the Federal Tort Claims Act, or . . . claims by any employee or service member whose injury arose ‘incident to his service.’”<sup>82</sup>

Thus, any credible attempt to overturn the *Feres* doctrine would also require significant amendments to the FTCA and the MCA. To overhaul multiple statutes and years of judicial understanding would (1) be virtually impossible to orchestrate politically, (2) could cause the unintended consequence of leaving the military and chain of command too exposed to frivolous lawsuits, and (3) prove too disruptive to the military justice system to justify the ensuing benefits.

Francine Banner, by contrast, suggests that even if Congress does not act to overturn the *Feres* doctrine, it is time for the judiciary to shift its interpretation of *Feres* such that adjudication by civilian courts of intra-military sexual assaults could become a reality. Banner argues that because intra-military sexual assault has extreme and destructive effects on military readiness, using *Feres* as a shield from adjudicating such claims is no longer defensible under the theory that the military needs autonomy and deference from civilian courts to maintain combat readiness.<sup>83</sup>

To illustrate the point, Banner compares the judiciary’s current treatment of the *Feres* doctrine in military sexual assault cases to its past treatment of the “Don’t Ask, Don’t Tell” (DADT) policy, which barred openly gay individuals from participating in military service.<sup>84</sup> Banner points to the Ninth Circuit’s interpretation of DADT in *Witt v. Dep’t of the Air Force*<sup>85</sup> as a model for how judicial decision making can “prove itself a vital engine of social change” in light of the “harm that can result

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those situations, an action brought against an individual will survive any attempt by the government to substitute itself for the named individual defendant(s).” *Id.*

<sup>82</sup> *Id.* at 59–60; 10 U.S.C. § 2733 (2012).

<sup>83</sup> Banner, *supra* note 55, at 729.

<sup>84</sup> *Id.*

<sup>85</sup> *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

from the glacial pace of legislative action.”<sup>86</sup> The *Witt* court held that when the government attempts to intrude on the personal and private lives of homosexuals, a heightened scrutiny of that attempt would apply and that, therefore, DADT would have to *significantly* further an important government interest when “alternative, less intrusive [methods of achieving that interest] are unlikely to achieve substantially the same results.”<sup>87</sup> Banner felt that this holding appropriately gave deference to the military without abdicating the court’s duty to pay homage to the Due Process Clause. Just as the Ninth Circuit did not “repeal” DADT but rather influenced legislation in concert with the “three concomitant powers” of the judiciary, executive, and legislative branches, Banner suggests the judiciary should now shift its view of *Feres* to one of deference, not abstention, and balance the harm of judicial intervention against the injustice perpetrated against military sexual assault victims.<sup>88</sup>

Despite the merit of Banner’s arguments, the Fourth and D.C. Circuits have refused to accept its rationale and have continued to broadly apply *Feres*. In *Cioca v. Rumsfeld*,<sup>89</sup> the Fourth Circuit held that despite the troubling allegations of sexual assault, judicial abstention was the proper course. The court justified its hesitation to act in that the particular remedy sought would be a new one at law—one that should be handled by Congress or the President as Commander in Chief.<sup>90</sup> The court also noted that (1) *Bivens* suits—which allow damages as remedies for constitutional violations—“are never permitted for . . . violations arising from military service, no matter how severe the injury or how egregious the rights infringement,” and (2) that *Feres* “concerns are implicated” when a civilian court is second-guessing military decisions in the case of intra-military sexual assault.<sup>91</sup> The D.C. Circuit in *Klay v. Panetta*<sup>92</sup> based its decision on similar grounds, stating that “the U.S. Supreme Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants.”<sup>93</sup> Even more clearly, it stated, “[T]he consequent need and justification for a *special and exclusive system of military justice, is too obvious to require extensive*

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<sup>86</sup> Banner, *supra* note 55, at 731.

<sup>87</sup> Witt, 572 F.3d at 818-19.

<sup>88</sup> *Id.* at 777.

<sup>89</sup> *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013).

<sup>90</sup> *Id.* at 509.

<sup>91</sup> *Id.* at 512.

<sup>92</sup> *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013).

<sup>93</sup> *Id.* at 11.

*discussion.*”<sup>94</sup> The court then noted that the role of civilian courts is not to tamper with this exclusive system of military discipline, structure, and justice.<sup>95</sup>

*b. Joint Jurisdiction with the EEOC—Not Worth the Costs*

A second suggestion argues that uniformed service personnel ought to be considered federal employees under Title VII of the Civil Rights Act.<sup>96</sup> Title VII prohibits employment discrimination based on “race, color, religion, sex, and national origin.”<sup>97</sup> As the Equal Employment Opportunity Commission (EEOC) is authorized to enforce Title VII, the military would then necessarily be subjected to concurrent EEOC jurisdiction. This suggestion would provide a guarantee of impartial review of complaints in federal and civilian courts, and it would also provide remedies that include compensatory and punitive damages.<sup>98</sup>

These benefits, unfortunately, come at too high a cost. First, the ingratiated civilian presence in military affairs would undermine the essential faith of servicemembers in their superior officers and in the military justice system generally. Furthermore, civilian courts might be incapable of fairly evaluating military decision-making, and the presence of civilian investigators might disrupt military discipline. Though proponents of concurrent EEOC jurisdiction call these concerns “superficial,” there are two other problematic components of the suggestion: costs and caseloads.<sup>99</sup> The EEOC’s high monetary caps on awards, while helpful to the victim, do not achieve optimal deterrence because the costs are paid by the employer, in this case the armed services, instead of the perpetrator.<sup>100</sup> Such costs, which are purportedly

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<sup>94</sup> *Id.* at 14 (emphasis added).

<sup>95</sup> *Id.* at 15.

<sup>96</sup> Spak & Tones, *supra* note 32, at 363-34; see *Gonzalez v. Dep’t of Army*, 718 F.2d 926 (9th Cir. 1983) (holding Title VII does not apply to uniformed members of the Armed Forces). *But see Hill v. Berkman*, 635 F. Supp. 1228, 1241 (E.D.N.Y. 1986) (finding Title VII could apply in limited circumstances involving facially discriminatory policies and that investigating anything less than an “outrageous incident of discrimination” would be “too intrusive” into military decision-making).

<sup>97</sup> 42 U.S.C. § 2000e-2 (2012).

<sup>98</sup> *Employees & Applicants*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/employees/remedies.cfm> [hereinafter *Employees & Applicants*] (last visited July 10, 2014).

<sup>99</sup> Spak & Tones, *supra* note 32, at 364.

<sup>100</sup> *Employees & Applicants*, *supra* note 98.

escalating, could make concurrent jurisdiction an unaffordable option.<sup>101</sup> Lastly, the increased caseload the EEOC would have to shoulder as a result of concurrent jurisdiction would inevitably increase wait times for victims. As these waiting periods are already subject to public criticism,<sup>102</sup> aggravating the situation would be inefficient and stress the EEOC's ability to resolve claims in a timely manner.

### C. Costs, Conclusion, and Recommendation

The consequences of sexual assault and harassment on both victims and the military as a whole are drastic. "More than 85,000 veterans were treated last year for injuries or illness stemming from sexual abuse in the military, and 4,000 sought disability benefits" for crippling depression and PTSD.<sup>103</sup> Compensation amounts for these claims vary, but some cases cost over \$500,000 per victim over the course of a lifetime.<sup>104</sup> In addition to medical costs, "one researcher has put the costs of sexual harassment to the U.S. Army at \$250,000,000 a year in lost productivity, personnel replacement costs, transfers, and absenteeism."<sup>105</sup> These financial costs do not include the costs on combat readiness and effectiveness.<sup>106</sup> Sexual assault and harassment in the military is thus a high cost, high stakes problem that demands the careful attention of policy makers and military members alike.

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<sup>101</sup> *EEOC Complaints: Damages Awards for Pain and Suffering Escalating*, SOLOMON LAW FIRM PLLC, <http://www.fedemploylaw.com/DC-Federal-Employee-Law-Blog/2011/October/EEOC-Complaints-Damages-Awards-for-Pain-and-Suff.aspx>.

<sup>102</sup> *EEOC, the Ugly Truth*, WHITEOUT PRESS, <http://www.whiteoutpress.com/articles/q12013/eeoc-the-ugly-truth/>; *EEOC Taking Longer to Complete Appeals, Hearings, Investigations*, FED. TIMES, <http://www.federaltimes.com/article/20120820/AGENCY-02/308200002/EEOC-taking-longer-complete-appeals-hearings-investigations>.

<sup>103</sup> *VA Help*, *supra* note 54.

<sup>104</sup> Tracking the overall cost of treating those with military sexual trauma (MST) before the new June 2011 system was difficult because MST cases were categorized under trauma generally. *Id.*

<sup>105</sup> Hollywood, *supra* note 11, at 152–53.

<sup>106</sup> *Id.*

### III. Civilian Crime Compensation Boards: A Useful Model

#### A. Background

Every state, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, and Guam have passed legislation to create crime victims' compensation programs.<sup>107</sup> These compensation boards pay for a variety of physical or emotional injuries suffered by victims and their families under state, federal, military, and tribal jurisdiction in the aftermath of violent crimes, such as homicide, spousal and child abuse, rape, assault, and drunk driving.<sup>108</sup> As payers of last resort, the state boards only pay for certain expenses not covered by insurance, pension benefits, Veterans' benefits, Medicare, Social Security Disability, or other federally financed programs.<sup>109</sup> Most states require victims to report crimes to law enforcement within seventy-two hours of the offense, file claims within one year, cooperate in the investigation and prosecution of the crime, and be innocent of criminal activity or misconduct leading to the victim's injury or death.<sup>110</sup> The offender's conviction is not required for victims to receive compensation for their economic losses resulting from the crime, but it is needed for court-ordered restitution—a punitive award statutorily determined not by the victim's need but by the offender's crime.<sup>111</sup> Each state has diverse funding sources for their compensation boards, as well as different benefits, compensation caps, restitution-collection processes, and strength of enforcement.<sup>112</sup>

#### B. Federal Funding for State Compensation Boards

In 1984, the Victims of Crime Act (VOCA)<sup>113</sup> established the Crime Victims Fund (CVF)<sup>114</sup> within the U.S. Treasury. The Victims of Crime

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<sup>107</sup> NAT'L ASS'N OF CRIME VICTIM COMPENSATION BODS., COMPENSATION FOR VICTIMS, available at <http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000120/BrochureCVC1.pdf> [hereinafter BROCHURE].

<sup>108</sup> The state must provide compensation to victims of federal crimes occurring within the state on the same basis that the program provides compensation to victims of state crimes. Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed Reg. 27,158 (May 16, 2001).

<sup>109</sup> BROCHURE, *supra* note 107.

<sup>110</sup> *Id.* Most states can extend these time limits for good cause. *Id.*

<sup>111</sup> *Id.* (BROCHURE).

<sup>112</sup> See Appendix B (Summary of Basic State Program Information).

<sup>113</sup> 42 U.S.C. §§ 10601–10608 (2006).

<sup>114</sup> Pub. L. No. 98-473, 98 Stat. 2170 (1984).

Act was amended in 1988 to establish the Office for Victims of Crime (OVC).<sup>115</sup> The OVC, as a part of the Department of Justice's (DOJ) Office of Justice Programs, administers CVF funds, awarding grants to states, local units of government, individuals, and other entities.<sup>116</sup> The CVF receives funding from "criminal fines, forfeited bail bonds, penalties and special assessments collected by the U.S. Attorneys' Offices, federal U.S. courts, and the Federal Bureau of Prisons."<sup>117</sup> As of 2001, gifts, bequests, or donations from private entities could be deposited into CVF, but the amount that can be deposited into the CVF is capped.<sup>118</sup> These caps, however, have been raised, which seems to indicate an increased need for, and congressional support of, assisting victims of crime.<sup>119</sup> Additionally, the Crime Victims Fund<sup>120</sup> requires that all sums deposited in any fiscal year that are not obligated by Congress must remain in the Fund for obligation in future fiscal years, without fiscal year limitation.<sup>121</sup> Appendix C details the amounts collected in, and distributed from, the fund from 1985 through 2012.

The CVF provides funds in varying amounts to the Children's Justice Act Program, the U.S. Attorney's Victims Witness Coordinators, the Federal Bureau of Investigation Victim Witness Specialists, and Federal Victim Notification Center. The remaining funds are divided between OVC discretionary funds, state victim compensation grants, and state victim assistance grants.

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<sup>115</sup> Pub. L. No. 100-690, 102 Stat. 481 (1988).

<sup>116</sup> M. ANN WOLFE, CONG. RESEARCH, SERV., RL32579, VICTIMS OF CRIME COMPENSATION AND ASSISTANCE: BACKGROUND AND FUNDING 1 (2004).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 2.

<sup>119</sup> In 2001, the cap was \$532.4 million; in 2002, it was \$550; in 2003, it was \$621; and in 2004, it was \$621.3. *Id.* app. C (Crime Victims funds, FY1985–2012).

<sup>120</sup> 42 U.S.C. § 10601 (2006).

<sup>121</sup> *Id.*



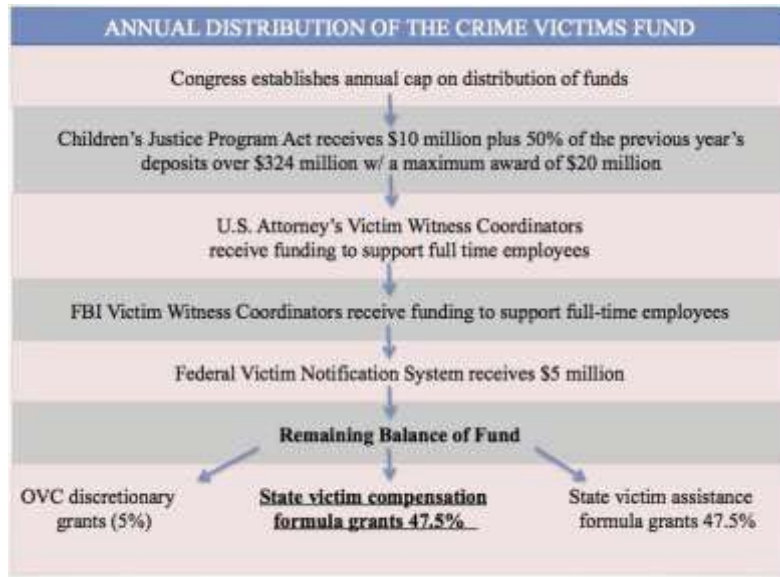


Figure 1. Annual Distribution of the Crime Victims Fund<sup>122</sup>

As shown above in Figure 1, state compensation boards receive 47.5% of remaining CVF funds.<sup>123</sup> The purpose of the federal grants is to “supplement state efforts to provide financial assistance and reimbursement to crime victims throughout the Nation for costs associated with crime, and to encourage victim cooperation and participation in the criminal justice system.”<sup>124</sup> The Victims of Crime Act requires each state’s compensation programs to cover “the following crime-related costs: (1) medical expenses, (2) lost wages for victims unable to work because of crime-related injury, and (3) funeral expenses.”<sup>125</sup> Many state compensation programs cover additional costs, such as sexual assault forensic exams, temporary lodging, transportation

<sup>122</sup> U.S. Dep’t of Justice, Office of Justice Programs, Office for Victims of Crime, *Crime Victims Fund* fig. 2, <http://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html> (last visited Feb. 18, 2015); U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, FY2013 CONGRESSIONAL BUDGET SUBMISSION V (Annual Distribution of the Crime Victims Fund).

<sup>123</sup> *Id.*

<sup>124</sup> Victims of Crime Act Victim Compensation Grant Program, 66 Fed Reg. 27158, 27,161 (May 16, 2001).

<sup>125</sup> *Compensation for the Rape Survivor*, RAINN, <http://www.rainn.org/public-policy/legal-resources/compensation-for-rape-survivors> (last visited July 16, 2014).

to medical providers, crime-scene cleanup, and rehabilitation.<sup>126</sup> A smaller number of states pay for attorney's fees, dependent care, financial counseling services, and annuities for the loss of support for children of homicide victims.<sup>127</sup> Just two states, Tennessee and Hawaii, provide compensation for pain and suffering.<sup>128</sup> Tennessee only offers this benefit for victims of sexually-oriented crimes and caps their pain and suffering claims at \$3,000, while Hawaii's benefits do not "quantify physical and/or emotional losses" but rather acknowledge a victim's suffering.<sup>129</sup> The Department of Justice's final implementing guidelines for the state compensation boards, however, allow compensation for all of the aforementioned categories.<sup>130</sup>

### C. Beyond Federal Funding—State Compensation Board Funding

While states receive a large portion of their funding from VOCA, they also rely on additional sources to supplement their compensation board funds—ultimately placing the burden on offenders, including imposing costs on offenders through system-wide offender surcharge fees,<sup>131</sup> fining offenders for "particular types of crime (e.g., child pornography, other offenses against children, domestic violence, sex

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<sup>126</sup> A comprehensive review of state compensation programs and resources can be found at *Providers/Community Leaders: U.S. Resources Map of Crime Victim Services & Information*, OFFICE FOR VICTIMS OF CRIME, <http://www.ovc.gov/map.html>; *Compensation for the Rape Survivor*, RAINN, <http://www.rainn.org/public-policy/legal-resources/compensation-for-rape-survivors>.

<sup>127</sup> *Id.*

<sup>128</sup> *CIC-Benefits*, TENN. DEP'T OF TREASURY, <http://www.treasury.state.tn.us/injury/CIC-Benefits.html#bene4> (last visited Feb. 18, 2015); *State of Hawaii Crime Victim Compensation: Benefits*, HAWAII, <http://dps.hawaii.gov/cvcc/benefits/> (last visited Feb. 18, 2015).

<sup>129</sup> *CIC-Benefits*, TENN. DEP'T OF TREASURY, <http://www.treasury.state.tn.us/injury/CIC-Benefits.html#bene4> (last visited Feb. 18, 2015); *State of Hawaii Crime Victim Compensation: Benefits*, HAWAII, <http://dps.hawaii.gov/cvcc/benefits/> (last visited Feb. 18, 2015).

<sup>130</sup> Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed. Reg. 27158, 27162 (May 16, 2001).

<sup>131</sup> By imposing a \$3 fee on all traffic and misdemeanor offenders, Virginia brings in \$3.8 million annually, which it deposits into Virginia's victim-witness fund. WOLFE, *supra* note 116, at 9. Similarly, Texas raised nearly \$69 million in 1999 for the Texas Crime Victims' Compensation Fund by imposing a \$45 penalty for a felony, \$35 for class A and B misdemeanors, and a \$15 fee for Class C misdemeanors. *Id.*

offenses, . . . and crimes against the elderly or disabled),”<sup>132</sup> imposing costs on offenders who are on probation for particular crimes,<sup>133</sup> withholding a percentage of inmates’ earnings,<sup>134</sup> charging restitution payments that pass directly from the offender to the victim of the violent crime,<sup>135</sup> and transferring to the fund “surplus restitution.”<sup>136</sup>

Other states impose non-offender-based fees to fund crime victim programs by adding a surcharge when issuing a marriage license or filing for a divorce,<sup>137</sup> attaching fees for issuing birth certificates (these fees generally fund a Children’s Trust Fund or child-abuse program),<sup>138</sup> selling specialized bonds,<sup>139</sup> placing a voluntary “income tax check-off box on tax forms that designate payment to crime victim programs,”<sup>140</sup> and granting special taxing authority.<sup>141</sup> Other states, after submitting a resolution to voters at a general election, grant county boards special taxing authority.<sup>142</sup>

#### D. Capping Award Amounts

Maximum awards range from \$10,000 to \$50,000, and states place varying compensation caps on the types of benefits victims can receive, such as mental-health counseling, funeral costs, or dental care.<sup>143</sup> Figure

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<sup>132</sup> Indiana, for example, assesses a \$100 fine on convicted offenders of various violent and sexual offenses against children that helps fund child abuse prevention programs. IND. CODE ANN. § 33-19-6-12 (Michie 2001).

<sup>133</sup> Arizona imposes a supervision fee for offenders on probation that gets deposited into the state’s victim compensation fund. ARIZ. REV. STAT. §§ 31-411, -418, -466 (2001).

<sup>134</sup> “Colorado, South Carolina, and Utah withhold a percentage of an inmate’s earnings through prison or community release work programs.” *Offender-Based Funding*, OVC ARCHIVE, [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin9/2.html](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin9/2.html).

<sup>135</sup> WOLFE, *supra* note 116, at 8. These restitution payments are court-ordered and obviate the need for the compensation board to pay the victim from board funds as the money is coming directly from the victim’s offender.

<sup>136</sup> “Surplus restitution” refers to court-ordered restitution that was “paid to a collecting agency but [that] was either declined by the victim or the crime victim could not be located.” *Id.* (citing FLA. STAT. ANN. ch. 960.0025 (Harrison 2001)).

<sup>137</sup> *See, e.g.*, IND. CODE ANN. §§ 33-17-14-2, -19-9-2, -19-9-4 (Michie 2001).

<sup>138</sup> *See, e.g.*, MINN. STAT. §§ 119A.12, 144.226 (2001).

<sup>139</sup> *See, e.g.*, CONN. GEN. STAT. § 4-66c (2001).

<sup>140</sup> *See, e.g.*, COLO. REV. STAT. § 39-22-801 (2001).

<sup>141</sup> Florida permits counties to tax food, beverages, or alcohol to help fund the construction and operation of domestic violence shelters. WOLFE, *supra* note 116, at 9. “Washington imposes a \$1-per-gallon tax on the syrup used to make soft drinks.” *Id.*

<sup>142</sup> Illinois, for example, created the Children’s Advocacy Centers. *Id.*

<sup>143</sup> CELINDA FRANCO, CONG. RESEARCH SERV., RL32579, VICTIMS OF CRIME

2, below, compares the state compensation boards of New York, California, and Texas by juxtaposing each state's non-VOCA funding sources, restitution-collection process, compensation caps, yearly costs, relative success at collecting restitution, and benefits not covered by the state program. These states were chosen as comparators because each has a large population, is geographically and demographically diverse, and utilizes different methods to run their respective boards.

State	Non-VOCA Funding	Payment Process	Caps	Yearly Costs	Items Not Covered
NY	• Offenders pay restitution, surcharges, and fees <sup>144</sup>	• Restitution paid to probation office <sup>145</sup>	• Maximums for benefit types <sup>146</sup>	FY2010-11: • \$31,751,660 paid to victims • \$132,114 collected in restitution <sup>147</sup>	• Those paid by insurance or other reimbursement source • Pain and suffering • Future losses <sup>148</sup>
CA	• Offenders pay restitution, fines, and fees <sup>149</sup>	• Restitution paid to victim • Fines and fees paid to Board <sup>150</sup>	• Floors and ceilings for convictions • Maximums for benefit types <sup>151</sup>	FY2011-12: • \$70,422,451 paid to victims • \$66,000,000 collected in restitution <sup>152</sup>	• Those paid by insurance or other reimbursement source • Pain and suffering • Property damages <sup>153</sup>
TX	• Offenders pay restitution	• Restitution is paid to the Board	• Cap per claim: \$50,000	FY2011-12: • \$71,018,268 paid to	• Those paid by insurance or other reimbursement

COMPENSATION AND ASSISTANCE: BACKGROUND AND FUNDING 9 (2008).

<sup>144</sup> TINA M. STANFORD, ANNUAL REPORT, N.Y. STATE OFFICE OF VICTIM SERVICES 37 (2011), [http://www.ovs.ny.gov/Files/Annual%20ReportFiscalYear2010\\_2011.pdf](http://www.ovs.ny.gov/Files/Annual%20ReportFiscalYear2010_2011.pdf).

<sup>145</sup> N.Y. STATE OFFICE OF VICTIM SERVS., A VICTIM'S GUIDE TO RESTITUTION IN NEW YORK STATE 2 (2011), <http://www.ovs.ny.gov/Files/2011%20ENGLISH%20RESTITUTION%20BROCHURE.pdf> [hereinafter N.Y. VICTIM GUIDE].

<sup>146</sup> N.Y. STATE OFFICE OF VICTIM SERVS., FINAL GUIDE TO COMPENSATION (2011), [http://www.ovs.ny.gov/Files/2011%20Guide%20to%20Compensation%20\(1\).pdf](http://www.ovs.ny.gov/Files/2011%20Guide%20to%20Compensation%20(1).pdf) (listing loss or damage of essential personal property up to \$500, burial expenses up to \$6,000, lost wages up to \$30,000 and so on).

<sup>147</sup> STANFORD, *supra* note 144, at 13, 56.

<sup>148</sup> N.Y. VICTIM GUIDE, *supra* note 145, at 2.

<sup>149</sup> CALIFORNIA VICTIM COMPENSATION PROGRAM PROVIDING FINANCIAL ASSISTANCE TO CRIME VICTIMS SINCE 1965, CALIFORNIA VICTIM COMPENSATION PROGRAM [hereinafter CAL. VICTIM COMPENSATION PROGRAM BROCHURE].

<sup>150</sup> CAL. VICTIM COMPENSATION AND GOV'T CLAIMS BD., 2011-2012 ANNUAL REPORT [hereinafter CAL. VCGCN].

<sup>151</sup> ADMIN. OFFICE OF THE COURTS, RESTITUTION, CALIFORNIA JUDGES BENCHGUIDES (2013), <http://www.vcgcb.ca.gov/docs/forms/victims/restitution/Benchguide.pdf>.

<sup>152</sup> CAL. VCGCN, *supra* note 150, at 7, 13.

<sup>153</sup> *Id.* at 4.

	and fees • Subrogation • Juror Donations <sup>154</sup>	directly <sup>155</sup>	• Maximums for benefit type <sup>156</sup>	victims • \$1,199,345 collected in restitution <sup>157</sup>	source • Pain and suffering • Property damages • Expenses not direct result of crime <sup>158</sup>
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Figure 2. Compensation Board Comparison of NY, CA, and TX<sup>159</sup>

California's Victims Compensation & Government Claims Board (CalVCGCB) stands out for its extraordinary ability to collect restitution.<sup>160</sup> While restitution is court-ordered and paid directly to the victim on top of whatever funds that the victim may receive from the compensation board,<sup>161</sup> the amount of restitution collected could have funded over 90% of its victim-compensation program if deposited directly in the CalVCGCB funds. California attributes its success to its twenty-five Criminal Restitution Compacts (CRCs)—partnerships between counties and the CalVCGCB—that “facilitate the imposition of restitution orders against criminal offenders through coordination with prosecutors, probation officers, and the courts.”<sup>162</sup> California has strict laws governing restitution that state: (1) victims are entitled to seek restitution from the criminal perpetrator to recover the full amount for any reasonable losses or expenses (not including pain and suffering),<sup>163</sup>

<sup>154</sup> Attorney Gen. of Tex., *Crime Victim's Compensation* (2012), [https://www.oag.state.tx.us/victims/about\\_comp.shtml](https://www.oag.state.tx.us/victims/about_comp.shtml); CRIME VICTIM'S COMPENSATION BROCHURE (2014), [https://www.oag.state.tx.us/AG\\_Publications/pdfs/cvc\\_brochure.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/cvc_brochure.pdf).

<sup>155</sup> CRIME VICTIM SERVS., 2012 ANNUAL REPORT 3 (2012), [https://www.oag.state.tx.us/AG\\_Publications/pdfs/cvs\\_annual2012.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/cvs_annual2012.pdf) [hereinafter TEX. ANNUAL REPORT].

<sup>156</sup> For example, the cap per claim for a victim suffering from a disability rises to \$75,000. *Id.* at 10. The maximum amount a victim could recover for the benefit type of “evidence replacement” is \$750. *Id.* at 13.

<sup>157</sup> Texas made \$6,000 of the restitution amount by charging installment fees. *Id.* at 4.

<sup>158</sup> Attorney Gen. of Tex., *Texas Crime Victim's Compensation Program Application*, [https://www.oag.state.tx.us/ag\\_publications/pdfs/cvcapplication.pdf](https://www.oag.state.tx.us/ag_publications/pdfs/cvcapplication.pdf).

<sup>159</sup> Figure 2 was prepared by the author using recent New York, California, and Texas compensation board reports.

<sup>160</sup> CAL. VCGCN, *supra* note 150, at 13.

<sup>161</sup> Interview with Cal. Dep't of Corrections and Rehabilitation (CDCR) employee (Apr. 11, 2014) [hereinafter Interview with CDCR employee].

<sup>162</sup> CAL. VICTIM COMPENSATION AND GOV'T CLAIMS BD., 2007–2008 ANNUAL REPORT 5, <http://www.vcgcb.ca.gov/docs/reports/AnnualReport-FY-07-08.pdf>.

<sup>163</sup>

Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. All monetary payments, monies, and

(2) prosecutors may not reduce this amount during plea bargains,<sup>164</sup> and (3) even if a charge is dismissed as a result of a plea bargain, the court may still order the defendant to pay restitution to the victim.<sup>165</sup> To receive restitution, a victim need not prove the defendant's conduct was the sole contributing factor; rather, the victim must only prove that the defendant's criminal conduct substantially caused the victim's losses.<sup>166</sup> Once a judge awards restitution, California law offers several resources to help victims collect payments, such as the ability to access the defendant's financial records, garnish wages or bank accounts, and place liens on property.<sup>167</sup>

If offenders are sentenced to prison, the California Department of Corrections and Rehabilitation (CDCR) automatically collects 50% of the offender's prison wages or other money that he or she has deposited into trust accounts.<sup>168</sup> Through this process, the CDCR collects \$1.4 to \$1.5 million dollars in restitution each month.<sup>169</sup> After an offender is released from prison, the CDCR refers his or her case to the Franchise Tax Board (FTB), which continues to collect restitution until it is paid in full.<sup>170</sup> Lastly, offenders may not move out of California until their restitution obligations are fulfilled.<sup>171</sup>

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property collected . . . shall be first applied to pay the amounts ordered as restitution to the victim.

CAL. CONST. art. I, § 28.

<sup>164</sup> *People v. Brown*, 147 Cal. App. 4th 1213, 1226, (2007) ("Victim restitution may not be bargained away by the People.")

<sup>165</sup> CAL. PENAL CODE § 1192.3 (West).

<sup>166</sup> Judicial Council of California Criminal Jury Instruction 240 (2014).

<sup>167</sup> *Victim Restitution in California Criminal Cases*, SHOUSE LAW GROUP, <http://www.shouselaw.com/victim-restitution.html> [hereinafter Shouse] (last visited July 16, 2014).

<sup>168</sup> CAL. DEP'T OF CORRECTIONS & REHABILITATION, OFFENDER RESTITUTION INFORMATION—FAQ, STATE OF CALIFORNIA, [http://www.cdcr.ca.gov/victim\\_services/restitution\\_offender.html](http://www.cdcr.ca.gov/victim_services/restitution_offender.html).

<sup>169</sup> Interview with CDCR employee, *supra* note 161.

<sup>170</sup> CALVCP & CDCR, YOUR RESTITUTION RESPONSIBILITIES: A GUIDE FOR ADULT & JUVENILE OFFENDERS 5, <http://www.vcgcb.ca.gov/docs/brochures/RestOffenders.pdf>.

<sup>171</sup> *Id.* at 6.

### E. Benefits and Detriments of State Crime Compensation Boards

For victims, there are several advantages to filing a compensation claim with a state compensation board as opposed to filing a civil suit. In civil suits, a victim may have to participate in a deposition, which could last for hours or days.<sup>172</sup> For traumatized victims, it is likely less emotionally stressful to file a compensation board claim than to sit through a deposition. Furthermore, in a civil suit, a victim's lawyer will often collect 30 to 40% of the victim's total recovery.<sup>173</sup> By contrast, the victim receives all of the money in court-ordered criminal restitution, as well as any money received from a state compensation board.<sup>174</sup> State compensation boards, however, almost never allow pain and suffering damages.<sup>175</sup>

The way civil suits determine pain and suffering, however, is also problematic. Unlike medical bills or lost wages that can be calculated, pain and suffering is a subjective amount determined by juries. Juries often have no other instruction but to reasonably compensate a victim according to their "enlightened conscience," which may lead to unpredictable distributions of damages that are highly influenced by how sympathetic the victim appears or how skilled the attorneys of the respective parties are.<sup>176</sup> Finally, even if victims are awarded pain and suffering damages, they may never see the money if their defendants are judgment proof or if the state fails to enforce payment.<sup>177</sup>

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<sup>172</sup> Shouse, *supra* note 167.

<sup>173</sup> *Id.*

<sup>174</sup> *Crime Victim Compensation: An Overview*, NACVCB, <http://www.nacvcb.org/index.asp?bid=14>.

<sup>175</sup> Pain and suffering is defined as "physical discomfort or emotional distress compensable as an element of non-economic damages in torts." BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>176</sup> RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 321 (3d ed. 1993) ("There are no objective guidelines by which you can measure the money equivalent of this element of injury; the only real measuring stick, if it can be so described, is your collective enlightened conscience."); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 766-67 n.10 (Summer 1995) (summarizing similar state and federal instructions); *see also* Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989).

<sup>177</sup> Ronen Avraham, *Putting a Price on Pain and suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 90 (2006).



#### IV. A Military Compensation Board

##### A. Reasons for a Separate Military System

Though military victims of sexual assault and harassment may file for compensation with the state crime victims compensation board in their official state of residence, a separate military crime compensation board would provide military victims with a more efficient, equitable, and expansive system of support than the patchwork state system. Not only are active military members moving every few years to a new state and duty station but also a substantial number of victims are injured outside the United States where no state crime compensation board would have jurisdiction.

As previously discussed, the military is a specialized society with different administrative rules, systems, and institutions designed to fulfill the military's unique mission of fighting wars and strengthening the national security of the United States. Providing a uniform compensation system for victims within this society can better address the specific needs of the military. By coordinating with military institutions, systems, and documents, like TRICARE insurance, VA benefits, court-martial and disciplinary records, and DoD financial and accounting services, the MCB could streamline the processes of accepting, reviewing, and processing military victims' claims. Moreover, a separate military system would allow for the close monitoring of an offender's payment schedule and the garnishing of wages if he or she has not been discharged from the service.<sup>178</sup>

As one cohesive system, the MCB would permit the military to play an active role in providing specific advice to military victims about application procedures in a way that it cannot possibly do for victims subject to fifty different state compensation boards. Furthermore, a single system would facilitate the military's ability to record the number and type of compensation applications. Having this separate military data may prove useful in future surveys and studies attempting to track or evaluate the effects of sexual assault and harassment in the military. Lastly, having the opportunity to apply for compensation within the

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<sup>178</sup> The Defense Finance and Accounting Service processes all court ordered garnishments for military members. *About Garnishment Operations*, DFAS, <http://www.dfas.mil/garnishment/about.html> (last visited July 21, 2014).

military will incentivize more victims to report either formally or informally to the authorities.

## B. A Separate Military Crime Victims Compensation Board

### 1. Organization of the MCB

Organizationally, the MCB should be established under the DoD Office of the Under Secretary of Defense for Personnel and Readiness (Sec Def P&R).<sup>179</sup> The DoD Office of Personnel and Readiness determines and oversees active-duty and reserve military pay and allowances, retired pay, and survivor benefits.<sup>180</sup> Additionally, the office is responsible for oversight and coordination with the Department of VA, Disability, Service member's Group Life Insurance (SGLI), Dependency and Indemnity Compensation (DIC), Department of Labor, Unemployment Compensation for Ex-servicemembers, Monitor Health Care, and other non-compensation benefits for active-duty, reserve and retired members.<sup>181</sup> The office is thus well suited to processing and determining monetary claims.

After the MCB reviews a victim's application and determines the compensation owed, the payment order would be sent to the Defense Finance and Accounting Service (DFAS), the victim, and the perpetrator. The DFAS would wait thirty days, and if no notice of appeal is filed, pay the victim and take action to garnish the perpetrator's pay. To administer appeals, the Sec Def P&R could utilize the services of judges assigned to the Defense Legal Services Agency, which already has an appeal process in place for DFAS claims and security clearances. If the offender is discharged from the service, DFAS should refer the offender's debts to the Treasury Department for collection through the Internal Revenue Service (IRS).<sup>182</sup>

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<sup>179</sup> As the U.S. Coast Guard is organized under the Department of Homeland Security (DHS) and not DoD, either the DoD compensation board would process Coast Guard Claims or the Coast Guard would have its own compensation board within DHS. Efficiency suggests DoD should process the claims, but whether DoD has the authority to do so must first be established.

<sup>180</sup> *Mission*, UNDER SEC'Y OF DEF., PERS. & READINESS, <http://militarypay.defense.gov/ABOUT/MISSION/> (last visited Feb. 18, 2015).

<sup>181</sup> *Id.*

<sup>182</sup> There is precedent for this type of debt collection transference. Pursuant to its Commerce Clause powers, Congress established a similar system to deal with debtors to the Federal Communications Commission (FCC) when it enacted the Debt Collection

## 2. *Submitting a Claim to the MCB*

On August 14, 2013, the Secretary of Defense established a victims' advocacy program to represent victims throughout the justice process.<sup>183</sup> Because a victim's compensation is not part of the military justice process, victim representation should include the claims process and continue until that process is completed.<sup>184</sup>

The Military Crime Victims Compensation Board would hear and determine all claims for awards filed pursuant to its authorizing statute outlined in Appendix A. Like the state compensation boards, the MCB would impose reporting and filing deadlines. As in a majority of states, victims would be required to informally or formally report the incident within seventy-two hours of its occurrence though the MCB could extend this deadline for good cause, especially if the victim's military duties or deployment circumstances hampered the reporting process.<sup>185</sup>

Applying to and receiving funds from the military compensation board, however, would be a post-adjudication process. Unlike the state processes, which generally require filing within one year of the incident, the MCB would require applications to be filed within 90 calendar days of the sentence being announced or other disciplinary action disposing of the allegations. Should the commander decide the complainant's allegations do not merit disciplinary action, the complainant must file an application within 90 calendar days of that decision. Again, the MCB may extend this application timeline for good cause, but it should do so

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Improvement Act of 1996. Pub. L. No. 104-124, 110 Stat. 1321, 1358 (1996). Under the Act, the Department of Treasury may collect FCC referred debts.

<sup>183</sup> Provisions of the National Defense Authorization Act of 2014 (NDAA) also mandate that a report detailing the actions taken "to provide the necessary care and support to the victim of assault, to refer the allegation of sexual assault to the proper investigatory agency, and to provide initial notification of the serious incident when that notification has not already taken place" be submitted within eight days of the unrestricted report of a sexual assault. Memorandum from Deputy Sec'y of Def. for Sec'ys of the Military Departments et al., *Sexual Assault Prevention and Response* (Aug. 14, 2013), available at <http://www.defense.gov/home/features/2013/docs/FINAL-Directive-Memo-14-August-2013.pdf>.

<sup>184</sup> 10 U.S.C. §1044 provides that military legal assistance may be provided to victims of sexual assault. The victim need only report they have been victim of a sexual assault and then choose to have a Special Victims' Counsel (SVC) assigned to them. The SVC will represent them in related legal proceedings and counsel them on available benefits.

<sup>185</sup> A majority of states require victims to report within seventy-two hours or less. See *infra* Appendix B.

sparingly to incentivize the timely resolution of complaints, the quick distribution of funds to victims, and the notification of compensation obligations to offenders within a reasonable amount of time. For other aspects of claim submissions, such as where to submit the claim or the particular nature of a claim's formatting, victims or those acting on their behalf should adhere to all rules outlined in Enclosure 5 of DoD Instruction 1340.2<sup>186</sup> that are not inconsistent with the process previously described.

At this point, it is important to note that the MCB claims system would not replace the VA disability claims system but rather work in tandem with it. First, the MCB has two functions unique unto itself: (1) punishing the perpetrator through a financial obligation based partially on the victim's age and offender's rank (as discussed in section B(3)(a) of Part IV), and (2) providing the victim compensation for his or her pain and suffering. These two functions do not directly overlap with VA objectives. The VA has no responsibility for the first function. And although the second MCB function, to compensate the victim for physical and emotional injuries, does have some overlap with the VA system, this overlap is similar to that between civilian victims' insurance and their compensation payments from a state compensation board. That is, the MCB creates a second place for active-duty soldiers and veterans to receive payments for some of their medical and disability needs. Like the relationship between a state compensation board and a victim's insurance, the MCB would only pay for portions of claims not covered by the VA and vice versa.

In some state compensation board systems, victims of sexual assault may apply for and receive *compensation* for economic losses (paid for from the state board via offender-based and non-offender-based fines, fees, surcharges, etc.) without a conviction,<sup>187</sup> but an offender would only pay *restitution* (paid to the victim directly by the offender) if convicted of a crime. The proposed MCB system combines these separate tracks, ordering the offender to pay *compensation* to either DFAS, who in turn will pay the victim from the U.S. Treasury, or if the offender is discharged, to the Internal Revenue Service. These collections from

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<sup>186</sup> U.S. DEP'T OF DEF., INSTR., 1340.21, PROCEDURES FOR SETTling PERSONNEL AND GENERAL CLAIMS AND PPROCESSING ADVANCE DECISION REPORTS 10 (12 May 2004) [hereinafter DoD INSTR. 1340.21].

<sup>187</sup> See *supra* notes 131 and 137 and accompanying text.

offenders, based on various factors discussed later in this paper, will constitute the MCB funds used to compensate victims.

This article focuses on military victims who pursue their claims through the adjudicative process. However, as allowed by state compensation boards, a conviction should not be strictly necessary for a military victim to file a need-based compensation application with the MCB. This military victim would not be eligible for pain and suffering damages, and the victim's offender would not be liable for payments. The victim could only receive payment for any related medical costs not covered by other sources. The money for these victims would come from the surplus funds necessarily received when convicted offenders "over pay" into the MCB funds.<sup>188</sup> As will be explained in subsequent sections, even if a *victim* will not be compensated for costs already paid for by military benefits or insurance, a convicted offender will still have to pay those costs to DFAS subject to a certain cap. This system mirrors traditional tort law, which requires tortfeasors to pay the costs of their victims' damages despite any insurance owned by the victim. This prevents a tortfeasor from realizing a windfall due to the victim's foresight. In this context, it also means that extra funds from convicted offenders can be redirected to other victims.

The potential award for pain and suffering will hopefully incentivize victims to take their claims through the adjudicative process instead of simply applying to the MCB for need-based compensation. Victims may also find the extra courage needed to adjudicate their claims knowing their subsequent efforts through the MCB might help other victims. Admittedly, it is not ideal that some offenders escape payment and justice for their wrongs while others are held accountable. However, even offenders who have been through the adjudicative process may be acquitted if the case is not clear-cut. That does not negate the needs of their victims for financial assistance. Of course, appropriate standards of review should be developed for these need-based applications.

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<sup>188</sup> This is not dissimilar from the process set out in 10 U.S.C. § 2772, which commands the Secretary of the military department concerned to deposit in the Armed Forces Retirement Home Trust Fund a percentage of forfeitures and fines adjudged against enlisted members, warrant officers, or limited duty officers. The Armed Forces Retirement Home offers retirees and certain veterans the benefits of a well-run retirement community.

### 3. The MCB Compensation System

#### *a. Introduction to MCB Compensation and Its Determination of Pain and Suffering Damages*

The MCB would, for the most part, follow the same DOJ regulations governing what benefits state compensation boards can and cannot offer. That is, like the states, the MCB would not compensate victims for items already paid for by any reimbursement source, including insurance, for damage done to property, or for items unrelated to the crime. Even though victims are not compensated for these expenses, the MCB must still consider those costs when computing the amount of compensation owed by the offender. That is, even if the MCB orders an offender to pay \$20,000 dollars, the victim may only receive \$10,000 for uncompensated needs. The excess funds will be saved for eligible victims who do not go through the adjudicative process or for whom the adjudicative process does not render a conviction.

The MCB should compensate victims' expenses for unreimbursed medical expenses, lost wages due to a crime-related injury, and funeral expenses, if any.<sup>189</sup> Unlike the state compensation boards, however, the MCB would also compensate eligible victims for pain and suffering.<sup>190</sup> While the MCB could, and perhaps should, provide compensation for all victims of crime and not just for victims of sexual assault or harassment, this article focuses specifically on the MCB's treatment of and compensation for sexually-based offenses.

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<sup>189</sup> Victims of Crime Act Victim Compensation Grant Program, No. 95, 66 Fed Reg. 27,158 (May 16, 2001).

<sup>190</sup> It may appear unfair that military victims would have access to pain and suffering damages while many civilian victims do not have access to the same from the state compensation boards. The solution to this apparent inequality remains a topic of concern. Even so, should the military successfully implement a compensation board providing scheduled pain and suffering, the states would hopefully adopt the military's model and begin offering comparable compensation opportunities. This seems increasingly possible as more states reshape their restitution collection policies into effective sources of crime compensation board funding. See, e.g., STATE OF HAWAII DEP'T OF PUB. SAFETY, CRIME VICTIM COMPENSATION COMM'N, FORTY-FIFTH ANNUAL REPORT JULY 1, 2012–JUNE 30, 2013, at 10 (2013) (noting how the Commission collected just \$46,000 in restitution in 2003, and after years of refining its restitution policies, collected \$600,000 in 2013). Again, it is important to remember that, under certain circumstances, civilians may have the opportunity to sue their perpetrator's employer for pain and suffering – an opportunity military victims do not have.

Without a jury to determine the pain and suffering damages, the MCB would need to determine pain and suffering. Deviating from a traditionally jury-based system may seem like a significant or radical legal shift, but the DoD and VA already incorporate a type of pain and suffering scheduling into their disability determinations. Both use a point-based Disability Evaluation System to determine whether a member is fit for duty or eligible for disability pay.<sup>191</sup> Furthermore, on a larger scale, several states have called for scheduled pain and suffering in tort reform,<sup>192</sup> and in England, juries no longer decide tort awards.<sup>193</sup>

Under a scheduled system of pain and suffering, the compensation a victim receives may not make them “whole.” Due to necessary compensatory caps on pain and suffering that the MCB may have to impose, MCB damages may be incapable of giving victims the full amount that they deserve or of completely replacing what a victim has lost. Even so, any pain and suffering damages the victim received would provide the individual with more money than he or she could have likely collected. Additionally, while money may not heal physical and emotional injuries, offering victims the opportunity to apply for pain and suffering damages, which is paid by offenders, would demonstrate the DoD recognizes the suffering of victims and imposes financial consequences on offenders.

When scheduling pain and suffering, the MCB should follow the basic recommendations set forth by Ronen Avraham in his 2006 article entitled *Putting a Price on Pain and suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*.<sup>194</sup> Avraham calculates pain and suffering by assigning a system of non-binding age-adjusted multipliers to a plaintiff’s medical costs.<sup>195</sup>

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<sup>191</sup> QRMCMC, *supra* note 51, at 95; *see also Integrated Disability Evaluation System (IDES)*, OFFICE OF WOUNDED WARRIOR CARE AND TRANSITION POL’Y, <http://www.med.navy.mil/sites/pcola/SpecialLinks/Documents/IDES%20Overview%20Handout.pdf>. Servicemembers who are no longer on active-duty must rate 30% or more on the scale to be eligible for disability retired pay although the pay is based on the member’s ranking or years of service, whichever is greater. *Id.* Members rated at below 30% receive severance pay. *Id.*

<sup>192</sup> Avraham, *supra* note 177, at 91 (noting four states have debated using “professional courts” composed of doctors and lawyers to determine damages as opposed to juries).

<sup>193</sup> *Id.*; *The Criminal Injuries Compensation Scheme*, Ministry of Justice (U.K.) (2012) (noting compensation amounts are set by Parliament).

<sup>194</sup> Avraham, *supra* note 177.

<sup>195</sup> *Id.* at 90. The multipliers would be nonbinding so that the Board could deviate when justice required. *Id.*



Avraham's system generates greater predictability in compensation awards and could approximate optimal deterrence on a case-by-case basis. Avraham's system, if adjusted for factors particular to the military, could reliably and fairly compensate victims of sexual assault and harassment for their pain and suffering.

1	2	3
Medical Costs	Multiplier	Pain-and-Suffering Damages
\$0–\$100,000	0.5	\$0–\$50,000
\$100,001–\$500,000	0.75	\$75,000–\$375,000
\$500,001–\$1,000,000	1	\$500,001–\$1,000,000
Above \$1,000,000	1.25	Above \$1,250,000

Figure 3. Calculating Pain and suffering Damages<sup>196</sup>

Avraham uses medical costs as his base number, reasoning larger economic losses correlate with a higher severity of injury, “which is in turn what pain and suffering is all about.”<sup>197</sup> As previously noted, however, some injuries caused by sexual assault and harassment may be hard to detect and may not generate the sizeable medical bills that would more accurately represent the victim's suffering.<sup>198</sup> Other latent injuries from sexual assault and harassment will cause medical expenditures only much later in time.<sup>199</sup> The MCB should therefore not rely solely on medical costs to determine the base number.<sup>200</sup> Instead, the MCB should assign a base dollar value to each military sexual offense, such as sexual abuse, rape, aggravated abuse, and so on.<sup>201</sup> A suggested process for determining this base number is explored in subsection (c) of this section.

Moreover, Avraham's multipliers only take into account age “to capture the fact that a younger person living with a disability” must do so

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 111.

<sup>198</sup> See *Effects of Sexual Assault*, *supra* note 58.

<sup>199</sup> *Id.*

<sup>200</sup> A base figure would also be helpful for wrongful death claims, in which there are generally no medical costs involved.

<sup>201</sup> This article does not attempt to provide suggested base numbers. However, state compensation boards like Oregon's that charge floors and ceilings for certain classes of felonies and misdemeanors would likely be informative to the MCB in setting their base numbers.

for a longer period of time.<sup>202</sup> In addition to age, the MCB multipliers should also account for aggravating factors, such as physical injuries, disfigurement, and disability; the intensity and longevity of the victim's emotional distress; lack of offender remorse; and the offender's rank. The offender's rank should be considered as it directly correlates with how much he or she is capable of paying to the victim. For instance, in 2012, a sergeant first class (E-7) with 20 years of service makes \$4,256 a month while a colonel (O-6) makes \$11,735.<sup>203</sup> Of course, those dismissed or discharged from the service for their offenses will no longer receive pay. Even so, the offender's previous earning capabilities, to a certain extent, reflect not only the offender's current ability to reimburse the victim (perhaps from savings) but also the offender's future earning potential.

While this system of base numbers and multipliers naturally creates a range of floors and ceilings for the pain and suffering element of compensation awards, the authorizing document for the MCB could also address monetary caps for other areas of relief, such as child care, lost wages, therapy, etc., either as individual categories or as a whole. Admittedly, restricting compensation awards has inherent problems: it may be unable to accommodate eggshell victims, it could prevent those with legitimately large claims from collecting, and it could throw a wrench in the idea of tailoring deterrence. The unfortunate financial reality, however, is that offender's salaries are naturally limited and thus so too must be the ultimate compensation awards to victims. Even so, as military victims may receive VA and other benefits that cover service-related medical costs after they are discharged from the service, limiting the total amount of collectable compensation reduces the risk of this unfairness.

*b. Determining Compensation Floors and Ceilings*

To determine what caps seem reasonable, it is helpful to look to state precedent. Ten states allow victims to recover \$50,000 or more in compensation awards.<sup>204</sup> Of these ten, only five allow victims to collect \$50,000 or more if their injuries are catastrophic or total and

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<sup>202</sup> Avraham, *supra* note 177, at 110.

<sup>203</sup> 2012 Enlisted Pay Chart, MILITARY.COM, <http://www.military.com/military/benefits/0,15465,2012-1pt6-Pct-Military-Pay,00.html#epay> (last visited July 16, 2014).

<sup>204</sup> See Appendix B.

permanent.<sup>205</sup> Returning to the three selected compensation comparator states, New York places no maximum caps on medical care expenses but limits other categories of benefits, California limits recovery to \$63,000, and Texas limits recovery to \$50,000 unless the injuries are permanent and total in which case the victim can recover up to \$125,000.<sup>206</sup> The MCB should therefore consider using \$50,000 as a benchmark in determining compensation award ceilings for most sexual assault and harassment crimes.

Unlike state compensation boards, the MCB should also establish an appropriate compensation floor that is applied before adding reimbursable costs and pain and suffering. One method of determining and assigning an appropriate compensation floor to crimes of sexual misconduct is to look at the costs society imposes on first-time drunk-driving convictions. The similarity between the costs of drunk driving and sexual misconduct lies not in the nature of the crimes but in the nature of the offenders. As drunk drivers presumably make enough money to pay for their car, their car's registration and maintenance, and their alcohol, society demands they pay dues for their misconduct. Likewise, military offenders have a guaranteed salary; and even if they are subsequently discharged for their sexual misconduct, it is at least guaranteed they had a salary during their time in the service. As shown in Figure 4 below, New York state charges offenders anywhere between \$7,392.50 and \$11,127.50 for a first-time drunk-driving conviction. If society is willing to charge drunk drivers, whose actions may or may not hurt anyone else, the military should be willing to charge sexual offenders more since their actions necessitate victims. This article proposes that the compensation floor for a rape conviction should be \$20,000, and the compensation ceiling for the same offense would be \$100,000, of which no more than \$62,500 could be allotted to pain and suffering.

By approximately doubling the drunk driver fine, the MCB could appropriately account for the varying nature of the two crimes. "As courts and legislators in this country have long recognized, rape is 'highly reprehensible, both in a moral sense and in its almost total

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

contempt for the personal integrity and autonomy of the . . . victim.”<sup>207</sup> The Supreme Court has similarly emphasized that, “[s]hort of homicide, it is the ‘ultimate violation of self.’”<sup>208</sup> While drunk driving is dangerous and potentially deadly, rape’s particular moral reprehensibility and its devastating ability to violate the victim’s personal autonomy demand a higher compensation floor than drunk driving.

Additionally, a \$20,000 compensation floor for rape ensures military compensation amounts are comparably fair to tort awards for the same crimes in civilian courts. Civilian courts, for example, have awarded compensatory awards ranging from \$100,000 to \$500,000 for multi-incident sexual assault and rape of inmates or detainees by prison guards.<sup>209</sup> For single incidents “of rape or sexual assault by an on-duty, uniformed enforcement officer who preyed upon his victim by either effectuating a traffic stop, offering a ride to a lone woman, or taking advantage of a woman who sought the officer’s assistance,” civilian courts have typically awarded damages ranging from \$50,000 to \$350,000.<sup>210</sup>

The infamous 1991 Tailhook Convention served as a basis for even higher compensatory damage awards.<sup>211</sup> In *Caughlin v. Tailhook Association*, Coughlin—a female Navy lieutenant—managed to escape a throng of men who “attacked, groped, [and] grabbed” her in a hotel hallway.<sup>212</sup> As a result of the incident, she experienced PTSD and other psychological problems that eventually caused her to leave the Navy.<sup>213</sup> An eight-person jury in Nevada awarded Caughlin compensatory damages of \$1,695,000 and set total punitive damages for the Tailhook Association and the hotel at over four-million dollars.<sup>214</sup> In light of the compensatory damages awarded to sexual assault victims in civil suits, a compensation floor of at least \$20,000 is necessary to ensure military victims receive comparable compensation to their civilian counterparts.

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<sup>207</sup> *Charleston Area Med. Ctr, Inc. v. Nat’l Union Fire Ins.*, No. 2:09-cv-00573, 2011 U.S. Dist. LEXIS 58520 at \*23–24 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>208</sup> *Id.*

<sup>209</sup> *Trinidad v. City of Boston*, No. 07-11679-DPW, 2011 U.S. Dist. LEXIS 26416, at \*18–19 (D. Mass. Mar. 15, 2011).

<sup>210</sup> *Id.* at 19.

<sup>211</sup> *Caughlin v. Tailhook Ass’n*, 112 F.3d 1052, 1054 (9th Cir.1997).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

DWI Expenses	Amount	Time Period	Total (Low)	Total (High)	Total (Average)
Towing	\$75+	--	--	--	\$75.00
Car Storage	\$45+/day	--	--	--	\$45.00
Defense Attorney	\$1500+	--	--	--	\$1,500.00
Bail Fee	\$0-500	--	--	\$500+	\$250.00
DWI Fine	\$350-1,000	--	\$350.00	\$1,000.00	\$675.00
State Surcharges	\$245-395	--	\$245.00	\$395.00	\$320.00
Ignition Interlock	\$75-150 installation, \$65-90 monthly maintenance	6 month minimum	\$465.00	\$690.00	\$577.50
Alcohol Evaluation	\$100+	--	\$100.00	--	\$100.00
Victim Impact Panel	\$10-50	--	\$10.00	\$50.00	\$30.00
Probation Supervision	\$0-250+	--	\$0	\$250.00	\$175.00
Conditional License	\$75.00	--	--	--	\$75.00
Drinking Driver Program	\$175-300+	--	\$175.00	\$300.00	\$237.50
DMV Civil Penalty	\$125-750	--	\$125.00	\$750.00	\$437.50
DWI license reinstate	\$100.00	--	--	--	\$100.00
DMV susp. Termination	\$50.00	--	--	--	\$50.00
Assessment	\$250.00	Every three years	--	--	\$250.00
Auto Insurance	\$2,000-\$3000	Per Year	\$2,000.00	\$3,000.00	\$2,500.00
				<b>Total 1:</b>	<b>\$7,397.50</b>
<i>Additional Costs:</i>					
SCRAM Ankle Bracelet	\$11/day	6 weeks+, average of 6 months	\$66.00	--	\$1,980.00
Fines if BAC is over > 0.18	+1000-2500	--	\$1,000.00	\$2,500.00	\$1,750.00
				Total:	\$3,730.00
				<b>Total 2:</b>	<b>\$11,127.50</b>

Figure 4. Cost of a First Time Drunk Driving Conviction<sup>215</sup>

<sup>215</sup> STOP DWI NEW YORK, PENALTIES FOR DRIVING WHILE INTOXICATED IN NEW YORK STATE, <http://www.stopdwi.org/sites/default/files/brochures/>

After assigning rape a compensation floor of \$20,000 and a ceiling of \$100,000, it becomes necessary to categorize other crimes of sexual misconduct to determine their relative compensation floors and ceilings. Figure 5, below, contains a list of common sexual offenses under the UCMJ, lists their maximum punishments, and assigns them a number category based on their corresponding maximum prison time. Figure 6, also below, shows what category numbers are matched to what maximum prison times, assigning a category of 1 to offenses that carry maximum punishments of confinement less than a year, a category of 2 to offenses that carry maximum punishments of one year confinement to less than five years, a category of 3 to offenses that carry maximum punishments of five years confinement to less than ten years, and so on in five-year increments until reaching category 7.

Crimes	UCMJ	Maximum/Minimum Punishment	Category
Cruelty and maltreatment	Article 93	Dishonorable discharge, forfeiture of all pay and allowances (P&A), confinement for 1 year	2
Murder	Article 118(1), (4)	Death, mandatory minimum is confinement for life	7
Murder	Article 118(2), (3)	Punishment other than death	7
Manslaughter (Voluntary)	Article 119	Dishonorable discharge, forfeiture of all P&A, confinement for 15 years	5
Manslaughter (Involuntary)	Article 119	Dishonorable discharge, forfeiture of all P&A, confinement for 10 years	4
Indecent Exposure	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 1 year	2
Rape	Article 120	Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life	7 <sup>216</sup>
Sexual Assault	Article 120	Dishonorable discharge, forfeiture of all P&A, and confinement for 30 years	7

STOP\_DWI\_PENALTIES\_INTERNAL\_TRI\_052713.pdf (last visited Feb. 19, 2015).

<sup>216</sup> National Defense Authorization Act for Fiscal Year 2014, Pub L. No. 113-66, § 1705, 127 Stat. 672, 959 (2013) (adding a mandatory minimum for subsections (a) and (b) of section 920 (article 120(a) or (b)) and forcible sodomy under section 925 (article 125)).

Aggravated Sexual contact	Article 120	Dishonorable discharge, forfeiture of all P&A, confinement for 20 years	6
Abusive Sexual contact	Article 120	Dishonorable discharge, forfeiture of all P&A, confinement for 7 years	2
Stalking	Article 120a	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	3
Indecent Viewing, Visual Recording, or Broadcasting	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 1 year	2
Forcible Pandering	Article 120c	Dishonorable discharge, forfeiture of all P&A, confinement for 12 years	4
Sexual Harassment: Threatening job, career salary	Article 127 (Extortion)	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	2
Sexual Harassment: Threatening job, career salary	Article 128 (Assault)	Confinement for 3 months, forfeiture of 2/3 pay for 3 months	1
Assault consummate by a battery	Article 128	Bad conduct discharge, forfeiture of all P&A, confinement for 6 months	1
Conduct unbecoming an officer and gentleman	Article 133	Dismissal, forfeiture of all P&A, confinement not in excess of that authorized for the most analogous offense, or if none prescribed, for 1 year	2
Sexual Harassment: Threatening job, career salary	Article 134 (Communicating a threat)	Dishonorable discharge, forfeiture of all P&A, confinement for 3 years	2
Assault with intent to commit rape	Article 134	Dishonorable discharge, forfeiture of all P&A, confinement for life without eligibility for parole or confinement for 20 years.	6



Assault with intent to commit sodomy	Article 134	Dishonorable discharge, forfeiture of all P&A, confinement for 10 years.	4
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Figure 5. UCMJ Crimes, Punishments, and Corresponding Categories<sup>217</sup>

With each offense assigned a number category, the relative compensation floors and ceilings can be established. The compensation floors decrease from a maximum of \$20,000 for category 7 offenses to \$1,000 for category 1 offenses. Meanwhile, the compensation ceilings decrease with each drop in category such that the average of the ceilings, assuming an even distribution of all crimes committed (excluding murder), is \$56,250. This average is close to the \$50,000 maximum award amounts maintained by numerous states' compensation boards. Realistically, more crimes will fall in the lower categories, suggesting that the maximum amounts charged offenders are more than reasonable by state standards. The only exception to the maximum \$100,000 charge is in the case of murder convictions in which case the compensation ceiling can reach \$250,000.

No:	Confinement	Min:	Max:	Base P&S:	P&S Multiplier Range:	P&S Max:
1	Confinement less than a year	\$1000.00	\$6,250.00	\$500.00	0.02-6.25	\$3,125.00
2	Confinement 1 year to less than 5 years	\$2,000.00	\$12,500.00	\$1,000.00	0.02-6.25	\$6,250.00
3	Confinement 5 years to less than 10 years	\$4,000.00	\$25,000.00	\$2,000.00	0.02-6.25	\$12,500.00
4	Confinement 10 years to less than 15 years	\$6,000.00	\$50,000.00	\$4,000.00	0.02-6.25	\$25,000.00
5	Confinement 15 years to less than 20 years	\$8,000.00	\$75,000.00	\$6,000.00	0.02-6.25	\$37,500.00
6	Confinement 20 years to less than 30 years	\$10,000.00	\$100,000.00	\$8,000.00	0.02-6.25	\$50,000.00

<sup>217</sup> This table was created by the author using the *Manual for Courts-Martial*.

	Confinement 30 years to life	\$125,000, unless murder then \$20,000.00	\$250,000	\$10,000.00	0.02-6.25	\$62,500
7						

Figure 6. Conviction Categories (“No.”), Minimums (“Min”), Maximums (“Max”), and Pain and Suffering (“P&S”)

*c. Determining Pain and Suffering*

As show in Figure 6, above, no more than half the amount of any compensation ceiling may be awarded in pain and suffering damages. To determine pain and suffering damages, the MCB will multiply the base number assigned to the applicable conviction by a pain and suffering multiplier. These pain and suffering base numbers are always half of the relevant compensation floor. The highest pain and suffering multiplier has a value of 6.25 points and the lowest multiplier has a value of 0.02 points.

Variable Components:	Multiplier Ranges:
Age of Victim	0.01-0.25
Rank of Offender:	0.01-0.25
Lack of Offender Remorse:	0 – 0.25
Physical Injuries:	0-2.75
Mental/Emotional Injuries:	0-2.75
<b>Total:</b>	<b>0.02-6.25</b>

Figure 7. Breaking down the Pain and Suffering Variable<sup>218</sup>

The appropriate multiplier number is determined by finding the sum of all point values assigned to the variables of victim age at the time of offense, offender rank at time of the offense,<sup>219</sup> offender remorse,

<sup>218</sup> The concept of using multipliers to determine pain and suffering is based on Avraham, *supra* note 177, at 90.

<sup>219</sup> The military is a hierarchal system, and soldiers place a significant amount of trust in their superiors. A violation of that trust arguably deserves an imposition of higher

victim's physical injuries, and victim's emotional injuries. As may be obvious, the worse the physical and emotional injuries, the more points the MCB will assign within those ranges. Similarly, the less remorse an offender demonstrates, the higher the offender's rank is, and the younger the victim is, the more points the MCB will assign those variables.

Moreover, Figure 7, above, shows that each variable has its own range of minimum and maximum values corresponding to the importance of the aggravating factors considered in previous sections. The first three variables are given lesser weight than physical and emotional injury categories because (1) while the amount of time a victim must live with his or her trauma and while the rank of the offender matters for payment purposes, these two factors are completely circumstantial and cannot reveal the true gravity of the offense as well as the other factors can, and (2) offender remorse may be extremely difficult to measure.

To follow this proposed scheme properly, additional schemes are needed to sensibly plot a demonstration of remorse, offender rank, and victim ages across a scale of 0.01 to 0.25 and to plot physical and emotional injuries on a scale of 0 to 2.75.

#### *d. Summary of Offender Payment*

To summarize, when an offender is convicted of sexual misconduct and the victim applies to the MCB, the MCB will first look to the category number assigned the offense. Next, it will see what floors and ceilings correspond with the conviction category number. To the floor amount will be added any expenses directly related to the crime incurred by the victim that have not been reimbursed by insurance or some other source, such as VA benefits. In addition to the floor plus victim expenses, the MCB will determine the amount of pain and suffering damages (capped at half of the conviction's compensation ceiling) owed the victim using the system of base numbers, multipliers, and point systems established in this article. Should the MCB hit the conviction's ceiling amount before pain and suffering can be considered, pain and suffering will not be considered unless justice requires an expansion of

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compensation burdens.

the pain and suffering maximum.<sup>220</sup> This determines the final amount awarded to the victim.

If the ceiling has not been reached, the MCB should also consider any costs to the victim that have been reimbursed by insurance or some source. Such costs should be added to the compensation owed by the offender to the MCB (but which will not be passed on to the victim). Likewise, the VA should assess MCB awards given when determining how much assistance to afford a benefits applicant.

#### *4. MCB Award Disbursement and Funding*

After determining a final compensation award and after the appeals process is complete, the MCB would promptly pay the victim the determined amount in either one lump sum or in several installments from the U.S. Treasury. Offenders would then make their payments to DFAS when on active-duty or through a garnishment order, which would, in turn, pay the U.S. Treasury. Like student loans and other priority debts, Congress should ensure such amounts are not dischargeable through bankruptcy.<sup>221</sup> This system would immediately provide funds for suffering victims and place the burden of compensation collection on DFAS and ultimately on the IRS. To collect money from offenders sentenced to a military confinement facility, the military should consider implementing a system similar to that of the CDCR by which DFAS could collect up to 50% of any money deposited into their accounts.

As with other debts owed to the federal government, the IRS should charge installment and late fees for compensation payments that do not comply with the original offender compensation plan. If necessary, the IRS would also be able to attach the offender's real and personal property in the same manner as for a federal tax lien, seize and sell an individual's assets pursuant to its levy authority, seize pending income tax refunds, garnish the wages of federal employees, and request civilian

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<sup>220</sup> Hitting the conviction's compensation ceiling before the consideration of pain and suffering is anticipated to be an extremely rare occurrence. If this turns out to be incorrect, the system of assigned floors and ceilings ought to be adjusted according to the principles laid out in this article.

<sup>221</sup> See 11 U.S.C. § 523(a)(8) (2012) (providing that educational loans owed to a governmental unit or a nonprofit institution of higher education are not dischargeable).

employers to participate in wage garnishment.<sup>222</sup> The IRS should apply its normal rules for liens and levies on retired pay. The 20-year statute of limitations and other provisions for civil fines in 18 U.S.C. § 3613(b)<sup>223</sup> should be applied.

While offenders pay their restitution obligations, and in case offenders are unable to pay off the entire order, the military will need to access funds within the U.S. Treasury to pay victims. Congress may choose to use VOCA as a “vehicle to address . . . [the] risks and needs” of military victims.”<sup>224</sup> Since its inception, Congress has amended VOCA several times “to support additional victim-related activities and accommodate the needs of specific groups of victims, such as child abuse victims and victims of terrorist acts.”<sup>225</sup> As the current situation of military victims render them a population with unique risks and needs, Congress should, under VOCA, allocate additional funds to the Crime Victims Fund (CVF) within the U.S. Treasury from which DFAS would pay victims.

While a U.S. Treasury-supported system may superficially appear to circumvent the *Feres* doctrine, a closer examination shows the compensation system does not violate any of the purposes for which *Feres* was enacted.<sup>226</sup> That is, by allocating funds to CVF for DFAS to use, Congress would simply be voluntarily appropriating funds to compensate victims of sexual assault and harassment—a process that would improve the existing comprehensive compensation schemes already in place for injured military personnel. Additionally, the proposed MCB system would not allow soldiers to sue the government,

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<sup>222</sup> Bobby L. Dexter, *Transfiguration of the Deadbeat Dad and the Greedy Octogenarian: An Intratextualist Critique of Tax Refund Seizures*, 54 KAN. L. REV. 643, 644 (2006).

<sup>223</sup> Title 18 U.S.C. § 3613(b) provides, “Termination of Liability—The liability to pay a fine shall terminate the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined.”

<sup>224</sup> LISA N. SACCO, CONG. RESEARCH SERV., R42672, THE CRIME VICTIMS FUND: FEDERAL SUPPORT FOR VICTIMS OF CRIME 14 (2012).

<sup>225</sup> *Id.*

<sup>226</sup> The *Feres* court’s rationale for barring military victims’ claims is: (1) the military offers “a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel,” (2) permitting soldiers to sue the Government or each other might have a negative effect on “military order, discipline, and effectiveness,” and (3) a “corresponding unfairness” would arise when non-uniform local tort law would decide service-connected claims. *The Feres Doctrine: An Examination of this Military Exception to the Federal Torts Claims Act: Hearing before the S. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Paul Harris, Deputy Assoc. Attorney Gen.); see also *Feres v. United States*, 340 U.S. 135, at 140–43 (1950).

nor would it have a negative effect on military order and discipline. In fact, as the goal of the MCB is to curb sexual assault, it would improve military order, discipline, and effectiveness. Lastly, no “corresponding unfairness” would arise from a non-uniform tort law because the MCB creates a uniform system within the military.

### 5. Challenging MCB Findings

A complainant, perpetrator, or government counsel could appeal MCB findings within 30 calendar days of receiving the decision.<sup>227</sup> After the appellant sends a written notice of appeal to the MCB, the appellant would have 30 additional days to file an appeal, and the appellees (government, perpetrator, or victim) would have 60 days to file a response. Three MCB members would review the appeal and have the authority to affirm, modify, or remand the decision. The review panel’s decision would stand as final. As with individuals appealing revoked security clearances,<sup>228</sup> the party paying the compensation can obtain legal counsel or other assistance at his or her own expense. Other aspects of the appeal process, such as content of an appeal and submission of an appeal, should conform with all rules outlined in Enclosure 7 of DoD Instruction 1340.21<sup>229</sup> that are not inconsistent with the process previously described.

### 6. Cross-Examination Concerns

Though the MCB provides compensation as a post-appellate process, some defense attorneys may try to use the process during the cross-examination of a victim at criminal trials, which may occur in courts-martial, state courts, or U.S. district courts, depending on the location of the offense, arguing, essentially, that the possibility of compensation creates perverse incentives for the victim to file a false report. Even so, the defense’s argument would not necessarily be persuasive or decisive.

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<sup>227</sup> Thirty days is the length of time New York allows victims to submit a written appeal to their state compensation board. *Frequently Asked Questions What Do I Do If I Am Unhappy with the OVS Decision on My Claim Application?*, N.Y. OFFICE OF VICTIM SERVS., <http://www.ovs.ny.gov/HelpforCrimeVictims/HelpFAQ.aspx> (last visited July 16, 2014).

<sup>228</sup> U.S. DEP’T OF DEF., 5200.2-R, PERSONNEL SECURITY PROGRAM para. C8.2.2.1.1 (Jan. 1987).

<sup>229</sup> DoD INSTR. 1340.21, *supra* note 186, at 17.

Victims have been able to sue perpetrators in tort after criminal trials for decades and prosecutors have nevertheless been able to obtain convictions.

#### V. Benefits of Creating the MCB Instead of Implementing Other Potential Solutions

The MCB uniformly provides justice for military victims of sexual assault and harassment while punishing their perpetrators, fostering proper deterrence levels, and contributing to the essential military goals of discipline and preparedness. By creating a military-based solution for a military problem, the MCB preserves the authority of the commander. While some critics may be uncomfortable preserving the strong role the commander plays within the military justice system, especially in regards to claims of sexual assault and harassment,<sup>230</sup> changing the role of the commander may come with undesirable and unintended consequences. As Diane H. Mazur notes in her article *The Beginning of the End for Women in the Military*,<sup>231</sup> “[u]sing the chain of command is ingrained in all service members,” and once the chain of command is discarded as an avenue for redress, she says sexual assault and harassment will “no longer [be] a priority for the command.”<sup>232</sup> That is, “[i]f we tell individual supervisors and commanders that they are incompetent to respond to women’s concerns, they will remain incompetent.”<sup>233</sup>

Moreover, victims will be less fearful of reporting sexual assault and harassment, and of engaging with the military’s administrative and judicial processes, knowing they will have a chance to approach the MCB (regardless of their offender’s conviction status) and recover monetary compensation that appropriately recognizes their struggles.

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<sup>230</sup> Some advocates do not like that commanders and not lawyers are deciding what disciplinary action to take, choosing whether or not to try a case, and in selecting the court members. See, e.g., *Will Military Sexual Assault Survivors Find Justice*, NOW (March 19, 2014), <http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory/> (last visited July 21, 2014). Others doubt the commanders’ abilities to ignore the pressure from the media or their superiors to “look good” and keep problematic issues in their unit quiet by ignoring them, or worse, actively discouraging victims from making allegations against other servicemembers. See, e.g., Jackie Speier, *Military Justice Bungles Sex Cases*, CNN, Mar. 20, 2014, <http://www.cnn.com/2014/03/20/opinion/speier-military-prosecution/>.

<sup>231</sup> Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 U. FLA. L. REV. 461, 464 (1996).

<sup>232</sup> *Id.* at 470.

<sup>233</sup> *Id.*



Additionally, the creation of the MCB accomplishes reform in a simpler and more efficient manner than other suggested solutions. By implementing the MCB, Congress would not have to transform the ingrained role of the commander or overturn federal case law to eliminate or seriously amend the *Feres* doctrine, the FTCA, the MCA, Title VII, or EEOC jurisdiction. Lastly, the MCB is a solution that gives the military the proper deference that courts and Congress have long afforded it. It is also large enough in its scope and vision to respond to the serious problem of sexual assault and harassment in the military.

## VI. Conclusion

In summary, the military is a community apart, a society with unique tasks and responsibilities that operates under a separate legal system. It is a community whose sexual assault and harassment victims often do not report incidents for fear of reprisal or retaliation.<sup>234</sup> None of these victims can sue the government for tort damages, and the compensation options available to them are decidedly lacking.

Creation of a separate Military Crime Victims Compensation Board creates an efficient military solution to a unique military problem, allowing military victims of sexual assault and harassment to apply for and receive just compensation awards. The award amount would include scheduled pain and suffering damages to ensure fair, predictable awards tailored for deterrence. Perpetrators would be responsible for paying the compensation, and if discharged from the military, the IRS could then use the full panoply of remedies to collect the debt. While the need for further improvement and refinement of the processes developed in this article remains, by creating the MCB, the military would make significant progress toward providing justice for victims and forcing offenders to face tougher consequences.

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<sup>234</sup> Banner, *supra* note 55, at 768-71.

Appendix A

Sample Draft Bill

(Original Signature of Member)

114TH  
CONGRESS

H. R. \_\_\_\_\_

To expand the roles and responsibilities of the Under Secretary of Personnel and Readiness to provide a uniform compensation system to military victims of violent crimes committed by military offenders to ensure victims receive adequate support and recognition of their suffering, impose appropriate consequences on offenders, and offer opportunities to military victims by which they can recover awards available to similarly situated civilians.

IN THE HOUSE OF REPRESENTATIVES

\_\_\_\_\_ introduced the  
following bill; which was referred to the  
Committee \_\_\_\_\_ on

A BILL

To expand the roles and responsibilities of the Under Secretary of Personnel and Readiness to provide a uniform compensation system to military victims of violent crimes committed by military offenders.

*Be it enacted by the Senate and House  
of Representatives of the United States  
of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Military Crime Victims Compensation Board Act of 2015.”

**SEC. 2. EXPANDING THE ROLE AND RESPONSIBILITY OF THE  
UNDER SECRETARY OF PERSONNEL AND READINESS.**

(a) SECTION 136(D) OF TITLE 10 U.S. CODE IS ADDED TO  
AS FOLLOWS:

(1) At the end of Section 136(d), the following sentence is added: “The Department of Defense shall establish a fund, to be known as the Military Crime Compensation Fund.”

(b) SECTION 136(D)(1) OF TITLE 10 U.S. CODE IS ADDED AS A SUBSECTION OF 136(D) AS FOLLOWS:

(1) Property loss, personal injury, or death due to sexual assault, abuse, or harassment: incident to combat or noncombat activities of the armed forces:

(A) Definitions:

(1) personal injury as used in this section refers to a victim’s physical as well as emotional pain and suffering caused by sexual assault, abuse, or harassment.

(2) servicemember as used in this section refers to any member or the Army, Marines, Navy, Air Force, or Coast Guard.

(3) service as used in this section refers to the Army, Marines, Navy, Air Force, and Coast Guard.

(B) The purpose of this Act is to promote and maintain a collaborative safe working environment within the armed services; to compensate the victims of sexual assault, abuse, and harassment, and to punish sexual offenders through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may

appoint, under such regulations as the Secretary may prescribe the Military Compensation Board (MCB), composed of at least five officers or employees or combination of officers or employees of the services, to settle and pay in an amount not more than \$100,000, or not more than \$250,000 in the case of murder, a claim against the United States for—

(1) damage to, or loss of, real property of any servicemember;

(2) personal injury to, or death of, any servicemember if the damage, loss, personal injury, or death—no matter the place of its occurrence, whether inside or outside the United States or its commonwealths or possessions—and is caused by, or is otherwise incident to, combat or noncombat<sup>235</sup> activities of the armed forces under his jurisdiction, or is caused by a member thereof or by the Coast Guard, as the case may be. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(C) A claim may be allowed under subsection (B) only if—

(1) the underlying incidence was reported within 72 hours of its occurrence, or a reasonable amount of time depending on deployment circumstances or military duties of the

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<sup>235</sup> While the Foreign Claims Act (FCA) bans claims arising from combat activities, there have been instances in which the DoD has still found a way to compensate combat related damages. These exclusions from the FCA ban are “strong evidence of the high value that the U.S. military places upon winning the hearts and minds of civilians and compensation as a means to that end.” Jordan Walerstein, Note, *Coping with Combat Claims: An Analysis of the Foreign Claims Act’s Combat Exclusion*, 11 CARDOZO J. CONFLICT RESOL. 319, 331 (Fall 2009). If the military prioritizes the hearts and minds of civilians in other countries, it seems logical that it would also prioritize the hearts and minds of its own soldiers. The combat provision should apply to military victims of sexual assault, abuse, and harassment.

victim, and was presented within two years after the filing of the report or within 90 days after the sentence of the court-martial is announced, or the matter is otherwise resolved through imposition of a reprimand or non-judicial punishment, whichever is later; and (2) it arose from criminal conduct by a servicemember who was on active duty when such conduct occurred.

An appeal of a final claim determination as prescribed in this chapter is allowed only if –

- (1) a complainant, an accused, or the United States believes the amount tendered is unjust or in violation of the rules prescribing compensation payments.
- (2) the appellant files notice of the written appeal within 30 calendar days of receiving the MCB's final payment decision.
- (3) the appellant files the appeal within 60 days of filing the notice of appeal.

(D) After the MCB reviews a victim's application and determines the compensation owed, an order for payment will be sent to the Defense Finance and Accounting Office (DFAS), the victim, and the perpetrator.

(E) If after 30 days no notice of appeal is filed, DFAS will pay the victim and either garnish the perpetrator's pay or forward the debt to the IRS for collection should the perpetrator be discharged.

(F) If the Secretary concerned considers that a claim in excess of \$100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant \$100,000 and report any meritorious amount in excess

of \$100,000 to the Secretary of the Treasury for payment.

(G) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(H) The Board will operate pursuant to the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness. The Secretary of Defense shall issue appropriate directives, appoint hearing officers, support staff, and appeal board members as necessary, to implement this statute within 180 days of the date of this authorization.

(I) The Military Crime Compensation Board designated under this paragraph shall have the following functions, powers, and duties

(1) To establish and maintain a principal office within the Department of Defense.

(2) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including rules for the determination of claims and military judge advocates or lawyers appointed as victim representatives shall be responsible for assisting victims in filing claims to the MCB.

(3) To require any military criminal investigative agency, military police agency, or Department of Defense command to provide investigative reports and records necessary to enable the Board to

carry out its functions and duties.

(4) To hear, determine, and review all claims for awards filed with the office by military victims including for pain and suffering damages.

(5) To establish an advisory council to assist in formulation of policies on the problems of crime victims and providing recommendations to the Under Secretary to improve the delivery of services to victims by the office.

(6) To establish a review board to review claims and affirm, modify, or remand the claims to ensure compliance with Department of Defense procedural regulations and to establish uniformity in awards throughout the Department of Defense.

(7) Render each year a written report to the Under Secretary on the office's activities including, but not limited to, the manner in which the rights, needs, and interests of crime victims are being addressed by the MCB and changes that are recommended in the authority or procedures of the MCB.



## Appendix B

### Summary of Basic State Program Information

Note: Significant exceptions exist for many states' reporting and filing requirements. In general, most states can waive reporting and filing requirements for "good cause" and many have specific exceptions for child victims. With regard to the maximums listed below, nearly every state has limits below the maximum on some specific expenses, such as funerals, mental health counseling, and lost wages. Go to [www.nacvcb.org](http://www.nacvcb.org) and the Program Directory there to find more state information.

	Reporting Requirement (in hours unless noted)	Filing Limit	Maximum Payment
Alabama	72	1 year	15,000
Alaska	5 days	2 years	40,000; 80,000 in homicides with multiple victims
Arizona	72	2 years	25,000
Arkansas	72	1 year	10,000; 25,000 for catastrophic injuries
California	reasonable time	3 years	63,000
Colorado	72	1 year	20,000 (each district may set lower maximum)
Connecticut	5 days	2 years	15,000; 25,000 in homicides
Delaware	72	1 year	25,000; 50,000 when injuries are total and permanent
D.C.	7 days	1 year	25,000
Florida	72	1 year	15,000; 30,000 for catastrophic injuries
Georgia	72	1 year	25,000
Hawaii	72	18 months	10,000; 20,000 if only medical expenses are claimed
Idaho	72	1 year	25,000
Illinois	72/7 days sexual assault	2 years	27,000
Indiana	48	180 days	15,000
Iowa	72	2 years	No overall limit; maximums for each expense
Kansas	72	2 years	25,000
Kentucky	48	5 years	25,000
Louisiana	72	1 year	10,000; 25,000 when injuries are total and permanent
Maine	5 days	3 years	15,000
Maryland	48	3 years	45,000
Massachusetts	5 days	3 years	25,000
Michigan	48	1 year	25,000
Minnesota	30 days	3 years	50,000
Mississippi	72	3 years	20,000
Missouri	48	2 years	25,000
Montana	72	1 year	25,000
Nebraska	72	2 years	10,000
Nevada	5 days	1 year	35,000
New Hampshire	5 days	1 year	25,000
New Jersey	9 months	3 years	25,000; 60,000 for catastrophic injuries
New Mexico	30 days; 180 days sexual assault	2 years	20,000; 50,000 for catastrophic injuries
New York	7 days	1 year	No medical maximum; limits on other expenses
North Carolina	72	2 years	30,000; additional 5,000 for funeral expenses
North Dakota	72	1 year	25,000
Ohio	no limit	no limit	50,000
Oklahoma	72	1 year	20,000; 40,000 in catastrophic cases and homicides
Oregon	72	6 months	47,000
Pennsylvania	72	2 years	46,500 (35,000 plus 10,000 counseling; 1,500 other)
Puerto Rico	72	6 months	6,000 per person, 15,000 per family; 40,000 in catastrophic
Rhode Island	10 days	3 years	25,000
South Carolina	48	180 days	15,000; 25,000 in catastrophic cases
South Dakota	5 days	1 year	15,000
Tennessee	48	1 year	30,000
Texas	reasonable time	3 years	50,000; 125,000 when injuries are permanent and total
Utah	no limit	no limit	25,000; additional 25,000 medical if base amount exceeded
Vermont	no limit	no limit	10,000
Virgin Islands	24	2 years	25,000
Virginia	5 days	1 year	25,000
Washington	1 year	2 years	50,000
West Virginia	72	2 years	35,000; 50,000 in homicides; 100,000 in catastrophic cases
Wisconsin	5 days	1 year	40,000; additional 2,000 for funerals
Wyoming	reasonable time	1 year	15,000; 25,000 for catastrophic injuries

NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS., BASIC PROGRAM INFORMATION, *available at* <http://www.nacvcb.org/NACVCB/files/ccLibraryFiles/Filename/000000000196/Basic%20Information%202014.doc>.

## Appendix C

**Crime Victims Funds FY1985–2012**  
 (dollars in millions)<sup>236</sup>

Fiscal Year	Amount Collected to CVF	Enacted Cap on CVF Deposits	Enacted Cap on CVF Distribution	Funds Made Available for Distribution <sup>a</sup>	Carryover CVF Balance
1985	\$68.3	\$100	—	\$68.3	—
1986	62.5	\$110	—	62.5	—
1987	77.5	\$110	—	77.5	—
1988	93.6	\$110	—	93.6	—
1989	133.5	\$125	—	124.2	—
1990	146.2	\$125	—	127.2	—
1991	128.0	\$150	—	128.0	—
1992	221.6	\$150	—	152.2	—
1993	144.7	—	—	144.7	—
1994	185.1	—	—	185.1	—
1995	233.9	—	—	233.9	—
1996	528.9	—	—	528.9	—
1997	362.9	—	—	362.9	—
1998	324.0	—	—	324.0	—
1999	985.2	—	—	500.0	—
2000	777.0	—	500.0	537.5	485.2
2001	544.4	—	537.5	550.0	785.2
2002	519.5	—	550.0	600.0	792.0
2003	361.3	—	600.0	617.6 <sup>b</sup>	718.9
2004	833.7	—	621.3 <sup>c</sup>	671.3 <sup>c</sup>	422.1
2005	668.3	—	620.0	620.0	1,307.4
2006	641.8	—	625.0	625.0	1,333.5
2007	1,018.0	—	625.0	625.0	1,784.0
2008	896.3	—	590.0	590.0	2,084.0
2009	1,745.7	—	635.0	635.0	3,146.5
2010	2,362.3	—	705.0	705.0	4,801.5
2011	1,998.0	—	705.0	705.0	6,099.7
2012	—	—	705.0	705.0	—

<sup>236</sup> U.S. Dep't of Justice, Office of Justice Programs, Office of Comm.; SACCO, *supra* note 233, at 4.